WE *allow of the Printing and Publiſhing of the Book Intituled,* A General Abridgment of the COMMON LAW, Alphabetically Digeſted under proper Titles, *&c.* By *Knightley D'Anvers* of the *Inner Temple*, Eſq;

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15 Of

A

General Abridgment

OF THE

COMMON LAW,

Alphabetically Digeſted under proper TITLES:

WITH

Notes and References

To the WHOLE.

With Three TABLES. *The Firſt*, Of the ſeveral Titles. *The Second*, Of the Names of the Caſes. *And the Third*, Of the Matter under General Heads.

By *KNIGHTLEY D'ANVERS*,
of the *Inner Temple*, Eſq;

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FH
MVSEVM
BRITANNICVM

THE BOOKSELLER TO THE READER.

GENTLEMEN,

YOU may be aſſured that I have with as much Impatience (as ſome of you have expreſſed) long waited for another Part of Mr. *D'Anvers*'s *Abridgment*; but I am ſenſible the Multiplicity of his Buſineſs, Diſtance from the Preſs, and Circumſtances of his Affairs, have been the only Reaſon of the Delay; and for my own Benefit, and your Satisfaction, ſome Time ſince I prevailed with him to begin to print a third Part as prepared without any further Improvements or Additions, of which you had publick Notice given, and that he would proceed no further; and accordingly the greateſt Part of this Title *Error* was printed, with an Intention that this and ſome others ſhould compoſe the third Volume; but he having ſince determined to live in *London*, by which Means he will have an Opportunity of correcting the Preſs more eaſily, than if the Sheets were ſent to him in the Country, (as uſual) he hath reſolved, if God gives him Life and Health, not only to proceed in this great Work as at firſt propoſed, but alſo (as deſired by many) to reviſe, ſupply and carry on the Same to this Time, and for that Reaſon hath added this Title *Error*, as a Continuation to the ſecond Volume only; intending, before he proceeds further, to make a *Supplement* to each Volume, in the Manner

with the Specimen *at the End of this Title, and bound up therewith:* And after theſe are finiſhed, to proceed with all Expedition in the Reſt of the Work, carrying the remaining Parts down to this Time.

N. B. The Method of ſupplying the two Firſt Volumes by an *Appendix* with Notes referring to the Volumes, as in the Specimen above mentioned, was contrived purely for the Eaſe of thoſe Gentlemen who had bought thoſe Volumes, and that they might not be put to the Charge of buying the Whole again; but the following Parts of this Work will be all printed and continued to this Time in Order, in the ſame Volume, as the Firſt and Second may hereafter be, if re-printed.

TITLE

TITLE
ERROR,
WITH
Its Diviſions and Subdiviſions.

Error.

——Who ſhall have it. 13
——Againſt whom it lies. 18
——At what Time. 19
——How the Writ ſhall be brought. 23
——Quod coram vobis reſidet. 27
——Where erroneous Judgment may be avoided without Writ of Error. 1
——By Plea. 1
——By Entry. 3
——In what Court. 3
——For what Cauſe. 4
——At what Time. 5
——Upon, or of what Judgment Error lies. 6, 7
——In what Court it lies. 8
——In Parliament. 87
——In ſame Court where Judgment given. 11
——What Things ſhall be Error. 90
——In What Thing
——In awarding Proceſs. 102
——In Proceſs. 93
——Againſt Jurors and entring ſuch Proceſs. 102, 107.
——In Proceſs or Executions. 99
——In Verdicts. 50, 105
——In Verdicts and Proceedings after Jury returned, and before Verdict. 50
——In Judgments. 52, 53
——In Judgments and Executions. 68
——In Names of Jurors or Parties. 98.
——Aided.
——Not where Error appears on Record. 72
——By Appearance. 69
——By Pleading. 71, 73
——Relation. 76
——By Verdict. 72
——By Releaſe of what would make Error. 77, 79. twice 81
——By Relinquiſhing what would make Error. 82
——By Conſent of Parties. 82
——In Trials. 83
——Record removed thereby. 25, 27

——What

Error
——What removed as Part thereof. 26
——Diminution. 45
——Certiorari. 46
——Proceeding
——How Court shall demean it self.
——Of what take Conusance without Certificate on Certiorari. 88
——Assigment of Error.
——In what Judgment. 31, 32
——At what Time
——It may be assigned. 41
——It ought to be assigned. 42
——By whom.
——By the Vouchee. 30
——By him that hath Benefit thereby. 37
——By him by whose Default the Error came. 38.
——What Thing may be assigned for Error. 33
——A Thing for his Advantage. 34
——In what Thing it may be assigned, 38
——Upon the Writ. 39 twice.
——How it may be assigned.
——Jointly. 40
——Not Error in Fact, and Error in Law. 40
——Joining in Demurrer or Rejoinder to the Error assigned. 44.
——Scire facias.
——Ad audiend' Errores. 43
——Against Tertenants. 43
——Pleading.
——Bar in Error. 84, 86
——Bar of Part, Bar in the Whole. 86
——By Party privy or Tertenant. 48
——At what Time. 49
——Reversal and Judgment thereupon.
——What Judgment to be given on Reversal. 59, 60, 109
——For Reversal of the Whole, or Part only. 61
——Restitution. 66
——To what Thing restored. 66
——One Judgment in Consequence reversed by Reversal of another. 64.
——But not collateral Thing executed. 65,
Bill of Exceptions. 111.

THE

A TABLE OF THE Several *TITLES*, with their *Diviſions* and *Subdiviſions*.

Eſcape.

——— What ſhall be ſaid an Eſcape. 113
——— Who ſhall be charged in an Action for an Eſcape. 114
——— Where the Sheriff or other Officer. 120
——— Reſpondeat Superior. 124
——— To whom it ſhall be ſaid an Eſcape. 124
——— What Things or Act will excuſe an Eſcape. 116
——— Retaking on freſh Purſuit, and what ſhall be ſo. 119
——— How the Priſoners ought to be demeaned. 115
——— In what Gaols Priſoners may be kept. 123
——— How to be charged for an Eſcape. 124
——— Pleader.
——— Declaration. 125
——— Plea. 126

Exchange.

——— Of what Things it may be. 127, 129
——— For a collateral Reſpect. 130
——— Of what Eſtates. 130
——— By what Perſons. 127
——— In reſpect of their Eſtates. 128
——— Where made without Deed. 131
——— By what Words. 131
——— Execution thereof.
——— At what Time. 132
——— How, and what ſhall be an Execution thereof. 132
——— Defeated. 134
——— What Act or Thing will defeat an Exchange. 133

Eſcheat.

——— In what Caſes it ſhall be. 135
——— Where the Lord hath a Tenant by Title, or not. 136
——— Who ſhall take Advantage thereof. 136
——— By what Act prevented. 136

Eſcheator. 138.
Eſcrowl. *Vide* Faits.
Eſgliſe. *Vide* Church.

Eſſoign.

——— Diſallowed. 139
——— For what Cauſes. 139
——— At what Time. 140
——— Againſt one againſt another. 240
——— What Perſons eſſoigned, and how many Sorts. 140
——— What Perſons ſhall have one. 141, 142

——— Who eſſoigned, and at what Time. 143
——— For what Cauſe. 145
——— Eſſoign of King's Service. 142
——— Againſt whom it lies. 144
——— By whom caſt. 145
——— How caſt. 145
——— Swearing Eſſoign. 146
——— How to be entered. 146, 156
——— In what Actions it may be. 147
——— At what Time caſt. 148, 149, 150
——— Eſſoign after Eſſoign. 251, 157
——— Trial thereof. 153
——— Adjourned and adjudged. 149, 153, 154
——— Warranted.
——— In what Caſes it ought to be. 154
——— At what Time. 155
——— How it ought to be. 156
——— Fourcher by Eſſoign. 157

Eſtate.
——— By and to whom made. 158
——— Of Freehold.
——— Not to be granted, to begin at a Day to come. 159
——— Moveable. 162
——— Intereſt, and no Eſtate in Fee, &c. for Life or Years. 162
——— Where in one without Entry or Claim. 163
——— What ſufficient Poſſeſſion to leaſe, give, or enfeoff. 165
——— Ended without Entry or other Act. 167
——— Limitation of Eſtates in Law.
——— Determination on ſuch Limitation. 168
——— What a Determination on an Act or Limitation. 170
——— In Fee.
——— By what Words. 172, 173
——— By Implication in reſpect of Perſon to whom given. 172
——— By Deviſe.
——— By what Words. 174, 178
——— In Tail.
——— By Deviſe. 179
——— By Implication. 188
——— Tail or Fee.
——— By what Words. 183, 184, 187
——— Of what Things Tail may be. 186
——— Tail at Common Law. 190
——— Deſcent thereof. 192
——— By whom docked. 190
——— At what Time docked. 191
——— Frankmarriage.
——— How created. 191
——— By what Words. 191
——— Tail Special. 192
——— Deſcent thereof. 193
——— Tail.
——— Charges binding Iſſue. 193, 194
——— Void as to one and not another. 195
——— Void by Death of Tenant in Tail, or voidable only. 196
——— Leaſe.
——— What may be leaſed. 204
——— What Perſon Leſſee. 198
——— Eſtate for Life by Deviſe.
——— By Implication. 199
——— For Life or otherwiſe. 200
——— Eſtate for Life or Fee. 202
——— Where no Eſtate limited. 202, 203
——— Leaſes for Years.
——— Of Things in reſpect of the Eſtate out of which raiſed. 204
——— How, and by what Words made. 206 T. U.
——— What Words will make Leaſes for Years. 207

——— What

——— What good for Uncertainty. 209
——— Leaſes for Years.
——— When ſaid to begin. 211
——— For how many Years it ſhall be ſaid. 216
——— To whom in reſpect of the Eſtate. 217
——— Forfeiture.
——— Of what Eſtate it may be. 217
——— Of Eſtate for Life or Years. 223
——— What Perſons may commit one. 218
——— By Matter of Record. 219 E. F.
——— What ſaid ſo by Matter of Record. 220
——— What Act or Thing ſhall be a Forfeiture. 222
——— In reſpect of the Perſon to whom made. 225
——— Diſpenſation therewith.
——— Who in reſpect of his Eſtate may diſpenſe therewith. 226
——— What ſhall be a Diſpenſation. 226
——— What Act ſhall excuſe a Forfeiture. 226
——— What purge it.
——— Entry for it.
——— On whom made. 227
——— At what Time. 228
——— What Perſon ſhall take Advantage of Forfeiture. 229
——— Leaſes at Will.
——— By what Words created. 230
——— By Act of Party. 231
——— By Act of Law. 232
——— To whom made. 233
——— Determination thereof.
——— By what Act. 233
——— By Act of Law.
——— Who may determine it. 235
——— At what Time. 235
——— How it may be determined. 236
——— Tenant at Sufferance. 236
——— Expreſs Eſtate in Tail, or otherwiſe, not altered or inlarged by Implication. 236
——— Croſs Remainders.
——— By Implication. 237.
——— Tenant in Tail after Poſſibility of Iſſue extinct. 238
——— The Privileges of ſuch Eſtate. 239
——— Tenant by the Curteſy. 240.
——— What ſufficient Iſſue to make one. 243
——— Of what Eſtate. 241
——— Of what Seiſin. 242.
——— When ſaid to commence. 243
Tenant in Dower. *Vide* Title *Dower*, my ſecond Part 652, and the Diviſions there.
——— Leaſes by Eccleſiaſtical Perſons.
——— By Common Law. 243.
——— By Statute.
——— By 32 *H.* 8. *c.* 28. by Biſhops, Tenants in Tail, and Husbands and Wives. 243
——— By 1 *El. cap.* 19. Biſhops reſtrained. 246
——— By 13 *El. cap.* 10. Maſters and Fellows of Colleges, Deans, *&c.* reſtrained. 247
——— By 13 *El. cap.* 20. Leaſes made void by Non-reſidence. 249
——— By 14 *El. cap.* 11. Bonds and Covenants for Enjoyment of Leaſes contrary to 13 *El.* made void, 249
——— By 18 *El. cap.* 6. the third Part of the Rent by Colleges to be reſerved in Corn. 249
——— By 18 *El. cap.* 11. concurrent Leaſes by Colleges, *&c.* reſtrained. 251
——— By 43 *El. cap.* 9. Judgments for Enjoyment of Leaſes contrary to 13 *Eliz.* made void. 251

Eſtoppel.
——— Where Plea ſtands with Deed, Record, or not. 252, 253, 272
——— Upon Record.
——— In what Caſes. 254
——— After Nonſuit. 260
——— After Diſcontinuance. 261
——— What Records ſhall eſtop. 255
——— By Conuſance.

——— What Perſons eſtopped. 257
——— By Confeſſion, &c. 258
——— By Verdict. 258, 259, 276, 277
——— By Specialty. 277
——— Who ſhall be eſtopped.
——— Stranger. 262, 263
——— The Heir. 276
——— Succeſſor. 276
——— In reſpect of the Eſtate.
——— Not Iſſue in Tail. 274
——— He that claims under the Eſtoppel. 275
——— Who ſhall take Advantage thereof.
——— He that claims under it. 262
——— What ſhall be an Eſtoppel.
——— What Act or Acceptance. 267
——— Not where Intereſt paſſes. 278
——— Recital. 265
——— Particularity, not Generality. 268
——— Eſtoppel againſt Eſtoppel. 273
——— What ſhall be ſo. 273
——— The ſeveral Sorts of Eſtoppels. 279
——— Muſt be mutual. 280.
——— How Advantage ſhall be taken thereof. 279.

Eſtray. 282
——— Of what Things. 281
——— Of whoſe Goods. 281
——— Proclamation thereof. 281
——— Abuſe thereof.
——— How the Lord ought to demean himſelf. 282
——— Who ſhall have it. 283.
——— Pleading in relation thereto. 284

Eveſque or Biſhop.
——— What, and how elected. 285, 287
——— Who may be, and by whom elected. 286
——— Conſecration. 287
——— Inveſtiture. 288
——— How it ought to be. 289
——— Temporalties.
——— Grant thereof. 288
——— At what Time. 288
——— How. 288
——— What Intereſt therein the Biſhop hath before ſuch Grant. 288
——— For what Cauſe they ſhall be ſeiſed by the King. 2 Roll. Abr. 228
——— Spiritualty.
——— Guardians thereof. 2 Rol. Abr. 223.
——— Metropolitan. 289. 1 Rol. Abr. 908.
——— Leaſes by Biſhops. 246

Eviction. 2 Rol. Abr. 279.
Evidence. 2 Rol. Abr. 675.

Excommunication.
——— Certificate thereof.
——— By whom made. 290, 292
——— How to be made. 291
——— Where the Cauſe thereof ought to appear. 295
——— Pleading thereof. 290, 292, 294
——— When, and againſt whom. 295
——— Excommunicato capiendo. 293
——— Abſolution. 296.
——— Cautione admittenda. 297

Execution.
——— In what Caſes it may be. 298, 304
——— Upon whom it may be by Entry. 298
——— At what Time by Entry. 299
——— In what Caſes by Entry. 342
——— Execution in Law.
——— To ouſt Action Executory. 299
——— Conjunction of Eſtates. 300

——— As

——— As to one ſerves for others. 301
——— Of what Eſtate ſued.
——— Againſt whom ſued. 303, 311, 313
——— Againſt Wife. 312
——— Of Fines, and which are executed. 304
——— Of what Things it may be. 305, 315
——— Of the Body, 326
——— Againſt what Perſons. 327
——— Of Land. 328
——— How made. 301, 307, 308
——— Joint and ſeveral. 307
——— Who ſhall have Execution. 308, 310
——— To what Place. 313
——— In what Place executed. 321
——— To what Time it ſhall relate.
——— For Land. 315
——— For Chattels. 318
——— At what Time Goods put in Execution. 320
——— When in Execution before Prayer. 322
——— When upon Prayer without more. 323
——— With Satisfaction againſt one ſerves for the other. 324
——— Without Satisfaction. 325
——— At what Time. K. L. 329
——— In what Caſes a Scire facias, or without. 329, 331, 332, 333
——— Scire facias, how, and againſt whom. 333
——— The Goods of whom taken in Execution. 334
——— What diſcharges a Man out of Execution. 335
——— Execution after Execution. 335, 336
——— After Eſcape. 335
——— After Delivery by Parliament. 338
——— After Death in Execution. 335, 336
——— What Execution after another.
——— After Capias or Fieri facias. 339
——— After an Elegit. 340
——— Who charged therewith.
——— Criminal or Perſon attainted. 342
——— At Common Law.
——— How, and by what Writ. 343
——— *Levari* and *Fieri facias.* 343
——— How by ſeveral Statutes. 344
——— By *Elegit.* 344
——— Re-extent. 346
——— By *Capias ad Satisfaciendum.* 344
——— Good without a Return. 345

Executors.
——— Ordinary.
——— His Power in Adminiſtrations. 347
——— Touching Wills and proving thereof. 348
——— Adminiſtration.
——— In what Caſes granted. 349
——— To whom granted. 354
——— By 31 Edw. 3. 350
——— By 21 *Hen.* 8. 407
——— Upon the Death of what Perſon granted. 351
——— Who ſhall grant it. 352
——— Metropolitan. 351
——— Bona notabilia. 353
——— Of what Value. 353
——— Repeal thereof. 410
——— The Effect of ſuch Repeal.
——— Diſtribution. 408
——— Adminiſtration durante minoritate. 355
——— The Power of ſuch Adminiſtrator. 357
——— Paraphernalia. 357
——— Who may make Executors. 359

——— For

——— For a collateral Reſpect. 360
——— How made. 363
——— In what Manner. 364
——— Actions by them for Act in Life of Teſtator. 360
——— What Actions they may have. 362
——— Againſt what Perſon. 363
——— What Perſons may be or have Executors. 364, 365
——— What Things Executors ſhall have, and what Heir. 366, 368
——— What Things Executors ſhall have as Aſſignees. 367
——— What Things go to Executors or Adminiſtrators. 367
——— Their Power before Probate. 369
——— Refuſal of Executorſhip. 412
——— What Acts Adminiſtration to make Aſſent to an Executorſhip. 369
——— Executor de ſon tort. 374.
——— What Acts make one Executor de ſon tort. 369.
——— The Power of ſuch Executor. 373
——— Who chargeable as Executors. 375
——— Aſſets, what ſhall be. 376
——— In what Actions they may be charged. 379
——— How Plaintiff ought to demean himſelf in Actions againſt them. 380
——— How Executors ought to demean themſelves in Actions againſt them. 382
——— Retainer by them. 385
——— In what Caſes. 385
——— The Power of Executors. 388
——— Between themſelves. 388
——— For what Debts charged. 389
——— By what Action. 390
——— What Debts ought firſt to be ſatisfied. 392, 395
——— Judgments in the Life of the Teſtator. 394
——— Judgments in their own Time. 396
——— Debts before Legacies. 397. Letters U. X.
——— Judgments againſt Executors, and how. 399
——— De bonis teſtatoris ſi, &c. & ſi non de bonis propriis. 398, 405
——— De bonis teſtatoris only. 403
——— General. 401
——— What Acts or Pleas of one binds the other. 399
——— Where they ſhall join or be joined in an Action. 412
——— Pleading in Actions by or againſt Executors.
——— Replication, Rejoinder, *&c.* 413
——— Where Traverſe neceſſary. 414

Extinguiſhment.
——— By Conjunction of Eſtates. 415
——— By Act in Law. 417, 422
——— By Unity of Poſſeſſion. 418
——— Cuſtoms. 421
——— By Feoffment or other Act. 422
——— Suſpenſion. 423
——— What Act makes it. 424
——— By Act of Law. 425
——— By Act of God, Enemies, &c. 426
——— Of Perſonal Things. 426
——— Once ſuſpended, extinct. 427
——— Avoided. 428

THE

TABLE

OF THE

Names of the Caſes

IN THE

Supplement to the ſecond Volume of the General Abridgment of the Law.

Ai.

	Pag.	Pl.
AIlway *and* Shillings	104	10

Al.

Alcock *and* Pargrave	50	2
Alcock's *Caſe*	51	7
	57	29
Aleworth *and others Caſe.*	20	9

An.

Angell *and* Cowper	31	8

Ap.

Appeſley *and Sir* John Key	67	13

Ar.

Arundel (*Lord's*) *Caſe.*	20	11
Arundel *and* Arundel	33	7
	95	16, 17, 18,

Aſ.

	Pag.	Pl.
Aſhford's *Caſe*	77	2

At.

Atkins *and* Higges	88	4

Ay.

Ayliff *and* Walker	3	1

Ba.

BAptiſt *and* Mitchelburn	2	7
Barkly (*Lord*) *and Counteſs of* Warwick	19	7
Ballad *and* Rawlins	19	7
Bach *and* Errington	21	14
Bawtrie *and* Herne	35	6
Barcroft *and* Richards	38	3
Barcock *and* Tompſon	42	2
Baniſter *and* Kennedy	47	11
Bartholomew *and* Belfield	48	1

The Table of the Names of the Caſes.

Ba.

	Pag.	Pl.
Banks *and* Pembleton	54	12
	69	6
	93	4
Bauntſey's *Caſe*	56	22
Banks *and* Chamberlain	56	25
Ballard *and* Cook	69	6
	93	4
Barber *and* Pomrey	79	1
Barns *and* Worlich	99	2
Banneſter's *Caſe*	100	8

Be.

Berry's *Caſe*	5	11
Beecher's *Caſe*	17	31
	54	5
Bethell *and* Parry	24	13
Bent *and* Marſh	37	6
	78	7
Benfield *and* Batlamew	48	1
Beverly *and* Cronwall	67	10
Berton's *Caſe*	85	15
Bedford (*Earl of*) *and* Foſter	94	13, 14
	95	15
Bellamy *and* Davis	102	1

Bi.

Biſhop of Glouceſter *and* Savacre	17	32
Biſhop of Glouceſter *and* Vele	20	11
Biſhop of Rocheſter *and* Young	46	3
Biſhop's *Caſe*	46	4
Bird *&* *al'* *&* Ormes	63	9
Billingham *and* Vavaſor	96	22

Bl.

Blady *and* Eaſtwigg	53	6
Blodwell *and* Edwards	101	13
	102	2
Blodwell's *Caſe*	103	3

Bo.

Boſwell's *Caſe*	46	2
Bowman *and* Hickſon	96	22
Booth *and* Rowe	105	3
Bond *and* Cartwright	108	5

Br.

Brooke's *Caſe*	17	37
Brown *and* Marſhall	54	11
Broad *and* Barnet	21	14
Broad *and* Nurſe	57	28

Br.

	Pag.	Pl.
Brown *and* Clag	58	33
	70	8
Brown *and* Stephens	80	4
Breſey *and* Lapworth	91	16
Brook *and* Brook	108	9
Brodnox *and* Coppinger	103	4

Bu.

Buſhell *and* Yaller	18	38
Buckhurſt *and* Mayo	66	3
	67	4
Burcher *and* Orchard	72	1
Buckley *and* Hale	73	3
Buckly *and* Williamſon	91	14
Burnet *and* Bleverhaſſet	106	7

Ca.

CAlvin's *Caſe*	8	9
Cannon *and* Abbot	18	41
Cave *and* Polehill	30	16
Carington's *Caſe*	85	14
Carne *and* Paſtrow	101	12
Cawdwell *and* Nun	103	6

Ch.

Cheſton *and* Bun *&* *al'*	12	12
Champernoon (*Sir Richard*) *and Sir* Will. Godolphin	24	7
	95	19
Chapman's *Caſe*	44	1
Chapman *and* Chaundler	97	28
Chicheſter *and* Philips	111	3

Cl.

Clarke *and* Sprigg	23	3
Clifford's *Caſe*	77	5
Clive *and* Vere	81	1
Clutterbuck *and* Billing	89	6

Co.

Coles *and* Lowe	1	5
Cole *and* Green	9	19
	61	5
Cornhill's *Caſe*	13	18
Coke *and*	16	27
Comyn *and* St. John	29	15
Cockman *and* Farrer	33	6
	86	18
Cooling *and* Lawrence	55	16
Conceller *and* Aier	56	19
Cook *and* Lewis	58	33
Coles's *Caſe*	85	16
Colly *and* Oliver	91	14

The Table of the Names of the Caſes.

Co.

	Pag.	Pl.
Collet *and* Marſhall	93	5, 6
Cowpe *and* Turner	97	24
Cort *and* Biſh. of St. Davids	112	4
Conſtade *and* Ayres	56	19

Cr.

Cromwell (*Lord*) *and* Andrews	23	5
	40	4
Cromwell (*Lord's*) *Caſe*	24	6
Crouch *and* Hains	47	8
Cretall *and* Murfield	62	4
Creed *and* Lucking	104	9
Croyden *and* Atwaie	105	6

Cu.

Cutforthy *and* Taylor	78	11

Da.

DAwkes *and* Peyton	12	13
	97	29
Darcy *and* Jackſon	30	6
Davis *and* Selby	40	1
Dayrell *and* Thinn	45	4

De.

Denning *and* Norris	34	11
Delamore *and* Heskins	60	1
	110	8
De Hunt *and* Steer	107	1

Do.

Downal's *Caſe*	46	2
Done *and* Smethurſt	86	1, 2
	99	4

Dr.

Drury *and* Young	58	36, 37
Drury *and* Dennis's *Caſe*	73	5

Du.

Dun *and* Lawe	21	14

Ea.

EAton's *Caſe*	6	4
Eaſtcot *& al' and* Edwards	79	1

Ed.

	Pag.	Pl.
Edwards *and* Simpſon	15	18
	36	10
Edwards *and* Crow	83	3

El.

Elvyn *and* Prime	58	35
Ellis *and* Wallis	61	1
Eltonhead *and* Deereman	62	6

En.

Enfield *and* Hill	111	2

Ep.

Epes *and* Epes	98	30

Er.

Ernely *and* Sage	107	2

Ev.

Evans *and* Filpot	104	8

Ey.

Eyles *and* Wales	91	12

Fa.

FAldoe *and* Ridge	10	27
Far *and* Loggins	56	19
Faldoe *and* Rudge	61	4

Fi.

Fiſh *and* Brocket	2	6
Fitz *and* King	82	1

Fl.

Floyd *and* Beſt	35	3
Floyd *and* Bethell	45	3

Fo.

Forbe's *Caſe*	3	5
Forreſt *and Sir* James Sandland	18	38
Foden *and* Maddock	68	1

Fr.

Franke *and* Stukely	16	26
Fridean's *Caſe*	53	4
Friget *and* Mallory	57	30
Fretzville *and* Molleneux	77	4

The Table of the Names of the Caſes.

Ga.

	Pag.	Pl.
GAY *and* Adams	25	16

Gi.

Giles *and* Timberly	54	6

Go.

Godfry's *Caſe*	2	11
Good's *Caſe*	56	19, 22
Goodier *and* Ince	66	3

Gr.

Griffith's *Caſe*	10	26
Griffith *and* South	16	27
	68	4
Gravenor *and* Maſſey	17	30
Green *and* Cole	27	11
Griffith *and* Clark	51	6
Grange *and* Denny	57	27
	78	8
Greenhill *and* King	57	31
Gregory *and* Edes	62	6
Groves *and* Short	76	3
Gregory *and* Shepherd	88	5
Groſſe *and* Boſcawen	92	19

Gu.

Guier *and* Goter	54	13
Guy *and* Cannon	58	33

Ha.

HAmon's *Caſe*	5	1
Hanmer *and* Thomas	11	4
Hayward *and* Williams	15	18, 19
	36	10
	63	10
Hardy *and* Brown	15	25
	32	2
	68	2
Haydon (*Sir* Chriſtopher) *and* Godſalve	24	9, 10
Hacker *and* Whatten	28	3
Hatch *and* Nichols	36	7
	41	3, 4
Hardye *and* Mayhew	56	19
Havert *and* Gibbons	69	4
	92	17
Harris *and* Goodale	70	7

Ha.

Hart's *Caſe*	85	13
Hawkins *and* Snelling	93	7
Harfleet *and* Butcher	107	11

He.

Henningham *and* Windham	16	29
Hedgewood *& al' and* Baily *& al*	32	5
Heskin *and* Chele	60	2
Herbert *and* Benion	95	16, 20
Hewſon's *Caſe*	97	28

Hi.

Hide *and* Markham	1	2
Hill *and* Tempeſt	32	4
Hill *and* Witlach	32	1
Hipply *and* Tuch	34	11
Hide *and* Marker	52	2
Hiplyn *and* Slack	100	11

Ho.

Holland *& al' and* Jackſon	16	28
	48	1
	49	7
Howſe *and* Layton	21	14
Holland *and* Lee	30	6
Holland *and* Dantſey *& al'*	30	6
Holmes *and* Twiſte	37	1, 2
Howel (John) *and* Thomas	48	12
Homes *and* Twiſte	55	17
Hoe's *Caſe*	66	1, 2
Holbeach *and* Bennet	61	6
Hocket *& ux' and* Stegold *& al'*	73	4
Holden *and* Collet	91	12
Hodgſon *and* Cremer	94	11
	106	8
Holmans *and* Collins	96	21

Hu.

Hunſley *and* Osborn	46	2
Hunt *and* Hurlewood	51	4
Huſſy *and* Moor	92	17
Hurſon *and* Hame	104	8

Ja.

JAcob *and* Mills	62	3

Je.

Jeffrys *and* Scot	15	25

The Table of the Names of the Caſes.

In.

	Pag.	Pl.
Inch *and* Goodfield	69	6

Jo.

Johns *and* Bowen	34	8
Johnſon's *Caſe*	69	5

Ju.

Jurdon's *Caſe*	52	3

Ke.

KErton *and* Avery	47	9
Kellet *and* Aſhe	51	4
Kent *and* Fowkes	54	9, 12
Keene *and* Owen	102	3

Ki.

King *and* Baniſter	100	6
King *and* Chaloner	5	13
King *and* Curtis	54	11
King *and* Jennings	98	1
King *and* Somerſham Inhabitants	53	1
King *and* Tothill *& al'*	40	6
Kingſton *and* Herbert	44	6
Kitchinman *and* Biſhop of Oſſory	105	5

Kn.

Knight *and* Savage	70	10
Knowls *and* Burtenſhaw	99	1
	100	9

La.

LAncaſter *and* Keyleigh	10	27
	18	38
Lane *and* Alexander	21	15
Lancaſter *and* Lowe	40	5
Lancaſt *and* Loa	46	2
Laſtlow *and* Tomlinſon	51	5
Lawrence *and* Gad	56	19, 22
Lawe *and* Doddeſworth	70	9
	96	23
Laſſel's *Caſe*	45	4

Le.

Lea *and* Ceely	36	9
Lee *and* Rewkely	53	6

Li.

	Pag.	Pl.
Linton *and* Turner	80	2

Ll.

Lloyd *and* Bethell	29	13

Lo.

Lowes *and* Webbe	23	1
Lownes *and* Coggan	47	7
Lovelace *and* Juniper	70	12
Lomar *and* Armorer	94	11
Lort *and* Biſhop of St. Davids	112	4

Lu.

Lumley *and* Marwood	35	6
Ludlow *and* Edgworth	107	4

Ma.

MArſh's *Caſe*	17	34
Mayhew *and* Baſnet	41	2
Margatrode *and* Beverley	54	8
Mapowder *and* Lippingcot	57	32
Markham *and Sir* Fran. Forteſcue	71	3
	90	5
Machduncoh *and* Stafford	83	4
Marſhall *and* Wigfield	91	12
Manning Mathew's *Caſe*	66	1

Me.

Meggot *and* Broughton	12	14
	32	4
Metcalf's *Caſe*	22	22
Mead *and* Axe	58	33
Merrill *and* Robins	93	5

Mi.

Milborne *and* Shaftoe	51	4
Mill *and* Maurie	57	32
Miller *and* Manwaring	104	11

Mo.

Morris *and* Fletcher	34	9
Molins *and* Wheately	34	10
Morgan *and* Bayly	55	14
Morris *and* Cadwallader	57	26
Moon *and* Axe	58	33
Moorcock *and* Hooles	58	34
Moile *and* Catchund	69	6
	93	4
Molton's *Caſe*	85	14
Morgan *and* Boddington	100	10

The Table of the Names of the Caſes.

Ga.

	Pag.	Pl.
GAY *and* Adams	25	16

Gi.

Giles *and* Timberly	54	6

Go.

Godfry's *Caſe*	2	11
Good's *Caſe*	56	19, 22
Goodier *and* Ince	66	3

Gr.

Griffith's *Caſe*	10	26
Griffith *and* South	16	27
	68	4
Gravenor *and* Maſſey	17	30
Green *and* Cole	27	11
Griffith *and* Clark	51	6
Grange *and* Denny	57	27
	78	8
Greenhill *and* King	57	31
Gregory *and* Edes	62	6
Groves *and* Short	76	3
Gregory *and* Shepherd	88	5
Groſſe *and* Boſcawen	92	19

Gu.

Guier *and* Goter	54	13
Guy *and* Cannon	58	33

Ha.

HAmon's *Caſe*	5	1
Hanmer *and* Thomas	11	4
Hayward *and* Williams	15	18, 19
	36	10
	63	10
Hardy *and* Brown	15	25
	32	2
	68	2
Haydon (*Sir* Chriſtopher) *and* Godſalve	24	9
		10
Hacker *and* Whatten	28	3
Hatch *and* Nichols	36	7
	41	3, 4
Hardye *and* Mayhew	56	19
Havert *and* Gibbons	69	4
	92	17
Harris *and* Goodale	70	7

Ha.

	Pag.	Pl.
Hart's *Caſe*	85	13
Hawkins *and* Snelling	93	7
Harfleet *and* Butcher	107	11

He.

Henningham *and* Windham	16	29
Hedgewood *& al' and* Baily *& al'*	32	5
Heskin *and* Chele	60	2
Herbert *and* Benion	95	16, 20
Hewſon's *Caſe*	97	28

Hi.

Hide *and* Markham	1	2
Hill *and* Tempeſt	32	4
Hill *and* Witlach	32	1
Hipply *and* Tuch	34	11
Hide *and* Marker	52	2
Hiplyn *and* Slack	100	11

Ho.

Holland *& al' and* Jackſon	16	28
	48	1
	49	7
Howſe *and* Layton	21	14
Holland *and* Lee	30	6
Holland *and* Dantſey *& al'*	30	6
Holmes *and* Twiſte	37	1, 2
Howel (John) *and* Thomas	48	12
Homes *and* Twiſte	55	17
Hoe's *Caſe*	66	1, 2
Holbeach *and* Bennet	61	6
Hocket *& ux' and* Stegold *& al'*	73	4
Holden *and* Collet	91	12
Hodgſon *and* Cremer	94	11
	106	8
Holmans *and* Collins	96	21

Hu.

Hunſley *and* Osborn	46	2
Hunt *and* Hurlewood	51	4
Huſſy *and* Moor	92	17
Hurſon *and* Hame	104	8

Ja.

JAcob *and* Mills	62	3

Je.

Jeffrys *and* Scot	15	25

The Table of the Names of the Caſes.

In.

	Pag.	Pl.
Inch *and* Goodfield	69	6

Jo.

Johns *and* Bowen	34	8
Johnſon's *Caſe*	69	5

Ju.

Jurdon's *Caſe*	52	3

Ke.

Kerton *and* Avery	47	9
Kellet *and* Aſhe	51	4
Kent *and* Fowkes	54	9, 12
Keene *and* Owen	102	3

Ki.

King *and* Baniſter	100	6
King *and* Chaloner	5	13
King *and* Curtis	54	11
King *and* Jennings	98	1
King *and* Somerſham Inhabitants	53	1
King *and* Tothill *& al'*	40	6
Kingſton *and* Herbert	44	6
Kitchinman *and* Biſhop of Oſſory	105	5

Kn.

Knight *and* Savage	70	10
Knowls *and* Burtenſhaw	99	1
	100	9

La.

Lancaſter *and* Keyleigh	10	27
	18	38
Lane *and* Alexander	21	15
Lancaſter *and* Lowe	40	5
Lancaſt *and* Loa	46	2
Laſtlow *and* Tomlinſon	51	5
Lawrence *and* Gad	56	19, 22
Lawe *and* Doddeſworth	70	9
	96	23
Laſſel's *Caſe*	45	4

Le.

Lea *and* Ceely	36	9
Lee *and* Rewkely	53	6

Li.

	Pag.	Pl.
Linton *and* Turner	80	2

Ll.

Lloyd *and* Bethell	29	13

Lo.

Lowes *and* Webbe	23	1
Lownes *and* Coggan	47	7
Lovelace *and* Juniper	70	12
Lomar *and* Armorer	94	11
Lort *and* Biſhop of St. Davids	112	4

Lu.

Lumley *and* Marwood	35	6
Ludlow *and* Edgworth	107	4

Ma.

Marſh's *Caſe*	17	34
Mayhew *and* Baſnet	41	2
Margatrode *and* Beverley	54	8
Mapowder *and* Lippingcot	57	32
Markham *and Sir* Fran. Forteſcue	71	3
	90	5
Machduncoh *and* Stafford	83	4
Marſhall *and* Wigfield	91	12
Manning Mathew's *Caſe*	66	1

Me.

Meggot *and* Broughton	12	14
	32	4
Metcalf's *Caſe*	22	22
Mead *and* Axe	58	33
Merrill *and* Robins	93	5

Mi.

Milborne *and* Shaſtoe	51	4
Mill *and* Maurie	57	32
Miller *and* Manwaring	104	11

Mo.

Morris *and* Fletcher	34	9
Molins *and* Wheately	34	10
Morgan *and* Bayly	55	14
Morris *and* Cadwallader	57	26
Moon *and* Axe	58	33
Moorcock *and* Hooles	58	34
Moile *and* Catchund	69	6
	93	4
Molton's *Caſe*	85	14
Morgan *and* Boddington	100	10

The Table of the Names of the Caſes.

	Pag.	Pl.
Mo.		
Morgan *and* Wye	101	12
Morgan *and* Stint	105	4
Ne.		
NEwton *and* Terry	20	10
	21	14
Newport (*Earl of*) *and* Duke of Buckingham	21	18
Nevill *and* Nevill	51	8
Ni.		
Ninian Mervil's *Caſe*	6	5
No.		
Noble *and* Tonny	103	7
Oa.		
OATS *and* Aylet	63	9
Oakes *and* Chaplyn	104	12
Od.		
Ody *and* Yates	10	27
Odell *and* Morton	30	17
Om.		
Omulconrie *and* Ayres	60	3
Or.		
Orchard *and* Jenkins	94	12
Os.		
Osburn's *Caſe*	51	3
Pe.		
PEard *and* Harris	102	2
Pi.		
Piggot *and* Harrington	13	4
	64	13
Pierce *and* Brown	55	15
Picekill *and* Rotherford	56	23
Piggot *and* Ruſſell	64	13
Po.		
Porter *and* Ager	39	1
Powis (*Lord*) *and* Kirtman	71	4
Pr.		
Prydierd *and* Thomas	26	1
Prat *and* Goodier	68	3
Preen *and* Keel	97	25
Qu.		
QUarrels *and* Searle	6	3
Queen *and* Biſhop of Glouceſter	17	32
Ra.		
RAndal's *Caſe*	2	12
Ray *and* Boaly	47	10
Randal *and* Higgins	92	17
Randal *and* Score	92	18
Re.		
Reckwith *and* Moile	25	15
Retorick *and* Chappel	77	6
	81	3
Ri.		
Rigly *and* Lee	52	5
Rippon *and* Rampton	104	11
Rivers *and* Guynn	54	8
Rily *and* Hillman	89	7
Richards *and* Hance	103	6
Ro.		
Roror *and* Eſcourt	46	5
Robins *and* Sambin	56	21
Robinſons *and* Barns	57	32
Rowlandſon *and* Simpſon	104	11
Sa.		
SAY and Seal (*Lord*) *and* Stephens	10	27
Saer *and* Gurney	12	13
Sarhe *and* Yeomans	56	19
Savil (*Sir Geo.*) *and* Thornton	75	18
Sainthil *and* Stocker	104	8
Sc.		
Scrogs *and* Lord Mortdant	17	33

Scuda-

The Table of the Names of the Caſes.

Sc.

	Pag.	Pl.
Scudamore *and* Scriven	62	2
Scawen *and* Arundel	97	27

Sh.

Shedlock *and* La Pere	7	8
Sheppard *and* Parry	108	7

Sl.

Slocomb's *Caſe*	56	21
	60	1
Slater *and* Bevis	103	5

Sm.

Smith *and* Bowles	20	8
Smith *and* Armin	21	14
Smith *and* Smith	35	4
	58	35
Smith *and* Skipwith	45	4
Smith *and* Odyham	71	2
Smith *and* James	91	14

So.

South *and* Griffith	15	25

Sp.

Sprye *and* Mill	23	4
Spring's *Caſe*	32	5
Specot's *Caſe*	63	8

St.

Stamford (*Earl of*) *and* Needham	10	27
Steward *and* Steward	20	9
Stocker *and* Kemiſh	29	12
Stephenſon *and* Eſtoft	36	8
Stroud *and* Blundel	56	23
Stretch *and* Parker	57	32
Star *and* Cuckcow	80	3

Sw.

Swift *and* Knot	70	12

Ta.

TAverner *and* Fawcet	21	14
Taſh *and* Hamet	99	3
Taylor *and* Nunly	104	8

Th.

Thorougood *and* Sewys	70	11

Ti.

	Pag.	Pl.
Tiffin *and* Lenton	32	4
	50	1
Tie *and* Adkins	63	7
	106	9
Tirrell *and* Darcy	106	10
Tingholme *and* Skinner	107	3

Tr.

Travis *and* Scott	47	6

Va.

VAughan *and* Lloyd	70	13
Vaſhman *and* Rowe	80	2

Ve.

Verten *and Sir* Jam. Sandeloe	28	10
	30	16

Vi.

Vigerous *and* Drake	102	1

Wa.

WArter *and* Perry *& al'*	1	4
	34	2
Watkin *and* Griffin	12	13
Watſon *and* Bernard	24	11
Waterhouſe *and* Coply	47	6
Walker *and* Wigfal	91	12
Watſon *and* Smith	103	5
Watſon *and* Cawſon	103	6

We.

Weblyn *and* Kirby	35	5
Weaver *and* Felton	46	2, 4
Weſtcot *and* Cotne	97	26

Wh.

Whiſtler *and* Lee	34	7
Wheatly *and* Stone	53	2
	54	7, 10
Whitrow *and* Edmond	100	7
White *and* Thomas	18	39

Wi.

Wincheſter (*Marqueſs*) *his Caſe*	7	7
	14	11, 12

Wincheſter

The Table of the Names of the Caſes.

	Pag.	Pl.
Wi.		
Winchester (*Marqueſs*) *his Caſe*	16	28
	25	1
Williams *and* Worral	15	25
	29	11
William's *Caſe*	17	35, 36
	50	1
Williams *and* Watkins	19	7
Wimark's *Caſe*	21	14
William *and* Gwin	38	10
Willis *and* Woodhouſe	41	5
Win *and* Lloyd	49	7
	85	17
Wilks *and* Jordan	52	1
Williams *and* White	63	11
Williams *and* Williams	98	30
Wo.		
Worgan *and* Kedgwin	28	3
	29	14
Wood *and* Metcalf	28	8
Wo.		
Worceſter (*Earl of*) *and* Trade	37	8
Wordman *and* Yates	42	7
Wood *and Dr.* Sutclife	55	18
	56	20
Wood *and* Paine	77	6
Woody's *Caſe*	78	10
Wolfe *and* Hole	92	70
Worſely *and* Metcalf	99	5
Wr.		
Wright *and* Mayor of Wickam	33	5
	85	10
Wright's *Caſe*	33	6
Wright *and* Jennings	85	10
Ya.		
YAtes *and* Windham	42	7

A N

AN

INDEX.

Abatement. Vide **Aſſignment of Error.**

WHERE Matter of Abatement is aſſignable for Error or not, 71 pl. 1, 2. *&c.*

Appearance.

Error helpt thereby, 69. Error in Summons, or not being ſummoned, helped thereby, 69 pl. 1, 2. 92 pl. 7. So Error in, or Want of any other Proceſs, if Judgment not given upon it, 69 pl. 3. So Want of Attachment of Privilege, 69 pl. 4. Want of Addition helped, 69 pl. 5. Want of an Original in *B.* or Bill in *B. R.* not cured, 69 pl. 6. Miſcontinuance as putting in Declaration after ſummoned, and before Appearance helped, 70 pl. 7. Otherways, when in ſuch Caſe Appearance without Proceſs, 70 pl. 8. Not helped, if declares againſt Defendant in Cuſtody of Serjeant, and it appears not he was ſo by any Proceſs, for which Defendant demurs, 70 pl. 9. 96 pl. 23. Not helped in inferior Court where *Entry Summonitus fuit*, inſtead of *A. B. queritur, &c.* 70 pl. 10. Return by one not Sheriff helped, 70 pl. 11. Fault or Miſtake of Continuance by *obtulit ſe* helped, 70 pl. 12. *Scire facias* dated before an *Audita querela*, upon which, *&c.* helped, 70 pl. 13. Otherwiſe of *Sci. fa.* on Judgment, 71 pl. 14. Error, if not ſaid whether Appearance in proper Perſon, or by Attorney, 94 pl. 12. By Attorney inſtead of Guardian, Error, 97 pl. 26, 27. Or if Blank for Name of Attorney, 97 pl. 28. Appearance of Infant in proper Perſon, Error, 97 pl. 29.

Aſſignment of Error. Vide **Error.**

Tenant firſt or ſecond Vouchee may aſſign, 30 pl. 1, 2, *&c.* He in Remainder may that Tenant was an Infant, and appeared by Attorney, 30 pl. 6. Upon Judgment by Default, 31 pl. 1, 2, 3. That Suggeſtion of Death of, *&c.* was falſe, 32 pl. 4. Tertenants in Error upon Judgment in *Sci. fa.* cannot aſſign Error in principal Judgment, 32 pl. 1. Nor Bail in Judgment againſt Principal, 33 pl. 2. Not what is directly contrary to the Record, 33 pl. 1, 2, *&c.* As that Conuſor of Fine died before Conuſance certified by Commiſſioners, 33 pl. 5. But may that he died after Conuſance, and before Certificate, 33 pl. 6. Not that Sir *Roger M.* who took and certified Fine, was no Knight, 33 pl. 7. Not that there is no ſuch Cuſtom, where Court certified to be held by Cuſtom, 34 pl. 7. Not that Proceedings were on bad Writ, when it appears there was good one, 34 pl. 8. 4 pl. 8, 9. Not that Attorney appearing on Record was then dead, 34 pl. 9. That Mayor who was Judge, had not received the Sacrament, *&c.* 34. pl. 11. Not that the Perſon ſuppoſed by Record to be the Judge, was not ſo, 35 pl. 3. 36 pl. 7 41 pl. 4. That *J. S.* who returned a *Venire* was not Sheriff, 35 pl. 4. Whether it may, that *J. S.* by whom the Defendant appeared, was no Attorney, 35 pl. 1, 2. Not that *A. W.* of the principal Panel, and *A. W.* of the *Tales*, ſame Perſon, 36 pl. 8. That a Place alledged to be, was not within the Juriſdiction of the Court, 36 pl. 9. That the Defendant was Feme Covert, though ſhe appeared and pleaded as Feme Sole, 36 pl. 10. By him in ſome Caſe who hath Benefit by the Error, 37 pl. 1. By the Defendant that no Judgment is given againſt him for Coſts, 37 pl. 2. That not amerced, 37 pl. 3, 4. So if amerced, where he ought to be fined, 37 pl. 5. Not by Defendant, that no Damages were given againſt him by Jury, 37 pl. 6. Not in Proceſs or Delay for his Advantage, 37 pl. 6. By Peer, that no Knight returned of his Jury, 37 pl. 8. but 71 pl. 4. *contra*; not he that takes by Fine in that Part by

which, &c. 38 pl. 9. Not by the Tenant that the Court awarded *Grand Cape*, where they ſhould have given Judgment, 38 pl. 10. In Error on Judgment in *Sci. fa.* Error in the Judgment in Annuity not aſſignable, 38 pl. 2. Upon Error in *redditione judicii* in Dower, it may be aſſigned in the Judgment for Damages, 39 pl. 1. In Error to reverſe Outlawry after Judgment, it may be aſſigned on the Judgment, 39 pl. 1. Jointly, 40. Though on ſeveral Writs of Error 40 pl. 1. *In omnibus erratum* no good Aſſignment, 40 pl. 2. Upon a Judgment in a *Dum fuit infra ætatem*, 40 pl. 3. In Error by 4 on Judgment in Aſſiſe and one appears, he cannot aſſign till the others ſummoned and ſevered, 40 pl. 4. In Error by Biſhop and Incumbent, the Incumbent alone cannot, 40 pl. 5. In Error by 2 on Outlawry, in Appeal, one cannot, 40 pl. 6. Not Error in Fact and in Law, 40 pl. 1. But no Advantage of Duplicity in Aſſignment, unleſs ſpecially ſhewed, 41 pl. 2. That he was not in *Cuſtodia Mar'*, 41 pl. 5. At what Time, 41. not Matter of Fact after *Sci. fa.* awarded, 41 pl. 1. As in Avoidance of Outlawry that he was in *France*, 41 pl. 2. Or that no Warrant of Attorney is certified, 41 pl. 3. But Error in the Record aſſigned after a *Sci. fa.* 42 pl. 1. As no Original, 42 pl. 5. Or that but *quarto exact'*, 42 pl. 6. After the Writ diſcontinued, and new one brought, other Errors aſſigned, 42 pl. 7. Not on Statute that one of the Seals wanting, 42 pl. 1. Not want of *Ca. ſa.* againſt the the Principal, though Judgment on two *Nihils* againſt Bail, 42 pl. 2. Not by Deſendant, that Coſts were not given againſt nim, 55 pl. 15. Matter of Abatement only not aſſignable for Error, 71 pl. 1, 2. 74 pl. 8. Unleſs the Court *ex officio* ought to have abated the Writ, 74 pl. 7. 90 pl. 1, 2. Not Plaintiff's Marriage before Judgment, 74 pl. 10. Diverſity where Writ actually abated, or abateable only, 75 pl. 15, 16, 17. Want of Patron's being made Defendant in *Quare impedit* not aſſignable, 75 pl. 18. Judgment reverſed or not, according to what appears on Record, whether aſſigned or not, 88 pl. 1, 2, 3, according to what certified, not other part, unleſs aſſigned for Error, Diminution alledged and certified, 88 pl. 4, 5. But not unleſs certified, 89 pl. 6, 7. What admitted by Pleading not aſſignable, as that Party was not Knight and Baronet, 90 pl. 5. In Error upon Judgment for Adminiſtrator, it cannot be aſſigned the Inteſtate is living, 90 pl. 7. What appears not in the Record cannot be aſſigned, 111 pl. 1.

Attorney. Vide Appearance.

B.

Bail.

DEath of Principal before Judgment pleaded to *Sci. fa.* 1 pl. 4. 34 pl. 1, 2. Cannot have Error to reverſe principal Judgment, 15 pl. 25. Principal and Bail cannot join in Error, 18 pl. 38. And if they do, on Judgment againſt Principal, the Record is not removed, 28 pl. 10. What Coſts againſt them, 68 pl. 1, 2. *Capias* on Record againſt Principal before *Sci. fa.* againſt Bail, 68 pl. 4. Principal cannot have Error on Judgment againſt Bail, 16 pl. 27. Nor Bail on Judgment againſt Principal, 15 pl. 25. May plead Principal died before Judgment, 1 pl. 4,

Baron and Feme.

Error brought by them for Nonage of Feme, 14 pl. 16. By them to reverſe Judgment againſt Feme as Feme Sole, 15 pl. 18, 19. But in Caſe of Fine, Baron may enter and avoid it, 15 pl. 18. Leaſe by Baron of Wife's Land only voidable, 52 pl. 1. Where erroneous joining Baron and Feme in Action helped by Verdict, 72. 73.

Bill of Exception.

Given by Stat. *Weſt.* 2. 111 pl. 2. extends not to criminal Proſecutions, *ibid.* Extends to inferior Courts, *ibid.* Not where Evidence allowed, and Jury give Verdict againſt it, 111 pl. 3. Lies where one offers to demur upon Evidence, and is over-ruled, 112 pl. 4.

C.

Certiorari.

AFTER Return of 1ſt, another granted, 45 pl. 3. 46 pl. 5. 47 pl. 6. After *in nullo eſt erratum*, 46 pl. 1, 2, 3. Not after *in nullo eſt errarum*, without Leave of Court, 46 pl. 4. So Chirographer for Proclamations after *Certiorari* returned by *Cuſtos Brevium*, 47 pl. 10. lies not to *B. R.* in *Ireland*, and if any Part of Record not before them, to write to Mayor, *&c.* 47 pl. 11. Lies not to inferior Court to certify *Venire*, 103 pl. 6.

Conſent. Vide Error.

Conſenſus tollit Errorem, 82, 83.

An INDEX.

D.

Damages. Vide Error.

Diminution.

NOT contrary to Record certified, 45 pl. 1, 2, 3. Not upon Error upon Bill of Exceptions, 45 pl. 1. Not upon Error brought on Judgment in inferior Court, but may upon Judgment in *Wales*, Counties Palatine, *&c.* 45 pl. 5. 103 pl. 6.

E.

Entry.

INfant cannot avoid Common Recovery by Entry, but by Error, 3 pl. 1. But Baron may avoid Fine of Wife by Entry, 15 pl. 18.

Error. Vide Removal *de Record.*

Judgment againſt dead Perſon not avoided by Plea, 1 pl. 1, 2, 3. But Bail may plead Principal died before Judgment, 1 pl. 4. Proclamation on Fine made on Sunday, *&c.* avoided by Plea or Error, 2 pl. 6. Judgment avoided by Plea, or otherwiſe, where no other Remedy, 2 pl. 10, 11. Stranger to Judgment may avoid the Effect of it by Plea, 2 pl. 12. Common Recovery againſt Infant avoided by Error, not Entry, 3 pl. 1. Outlawry where reverſed by Plea, and where by Error, 3 pl. 1. 4 pl. 6, 7. Judgment avoided by Error, or *Certiorari*, 3 pl. 4. Outlawry not avoided without Error, though Statute ſays, it ſhall be void, 5 pl. 7. Unleſs where ſuch Writ would not be agreeable with Record, 5 pl. 7. Convictions, *&c.* quaſhed on *Certiorari*, and avoided without Error, 5 pl. 11. But not Judgment on Indictment at Seſſions, 5 pl. 12. But Record of Force by Juſtices of Peace quaſhed, 5 pl. 13. On Nonſuit at *Niſi prius*, *&c.* 6 pl. 1. Where Error lies, tho' Judgment void, 6 pl. 3. Upon Award of Exigent, 6 pl. 4. Where upon Petition to King, 6 pl. 5. To reverſe Attainder in Treaſon, 7 pl. 6. On Judgment on Indictment of Recuſancy, tho' Error to King's Diſadvantage, 7 pl. 7. Not on Judgment *quod recuperare debeat*, 7 pl. 8. Upon what Judgments, 7 pl. 8. In what Court it lies, 8 pl. 1. *&c.* In *B. R.* on Judgment in Chancery, 8 pl. 1. In Parliament, 8 pl. 2. On Judgment in *Cinque Ports* where, 8 pl. 3, 4, 8. On Judgments in Counties Palatine, *&c.* 8 pl. 6, 7, *&c.* Not on Judgment in *Scotland*, 8 pl. 9. On Judgment in *Wales*, 9 pl. 11, 12. 10 pl. 26. Whether it lies in *Banco*, 9 pl. 15. Whether in Chancery, 9 pl. 16, 17, 18. On Judgment in *Haſtings*, 9 pl. 19. On Judgment in *Durham*, 9 pl. 21. On Judgment in Exchequer by 31 *Ed.* 3. 10 pl. 25. On Judgment in *B. R.* by 27 *Eliz.* 10 pl. 27. Where Fault not in the Judgment of Court, but in Proceſs or Officers, Error lies in the ſame Court, 11 pl. 1, 2, *&c* 3 pl. 15. As if falſe *Latin*, 11 pl. 3. Miſtake in *Habere fac' poſſeſſionem*, as if of two Meſſuages in one Town, where the Judgment is in two Towns, 11 pl. 4. Outlawry on Exigent *de B. R.* there reverſed, becauſe Judgment of Coroners, 11 pl. 5, 6. 12 pl. 9. Several Caſes where Error lies in *B. R.* to reverſe their own Judgment or not, 12 pl. 10, 11, *&c.* Upon Error in Fact, as Infancy, or Death, it lies in ſame Court, 12 pl. 13, 14. In ſame Court in Criminal Caſes, though not in Civil, 13 pl. 18. Who ſhall have Error, 13 pl. 1, 2, *&c.* By ſuch Perſon who ſhould have the Thing in Demand, 13 pl. 1, 2. As Heir within Cuſtom of *Borough-Engliſh*, Heir on Part of Mother, *&c.* 13 pl. 2. Only Parties or Privies ſhall have Error, 13 pl. 3. But though they ſhall have nothing, ſhall join for Conformity, 13 pl. 4. How brought and aſſigned by Infant, 13 pl. 4. By Vouchee, 14 pl. 5. By Tenant by Reſceit, 14 pl. 7, 8. Not by Garniſhee, 14 pl. 10. By Remainder-Man during particular Eſtate, if privy to Record by Aid prayer, *&c.* 14 pl. 11, 12, 13. 22 pl. 20. By Baron and Feme for Nonage of Feme, 14 pl. 16. By Alienee of Land where Execution upon Statute is ſued againſt him, 14 pl. 17. By Baron and Feme to reverſe Judgment againſt Feme as Feme Sole, 15 pl. 18, 19. By Tenant to Action, though he aliened, *pendente*, *&c.* 15 pl. 20, 21. But not by Alienee, 15 pl. 23, Not by Bail on principal Judgment, 15 pl. 25. Not by Executor of Heir who died after Judgment, to recover Monies out of the Lands deſcended, 16 pl. 26. Not by Principal upon Judgment againſt Bail, 16 pl. 27. Upon a Recovery by Remainder-Man in Tail, 16 pl. 28. By the Iſſue in Tail, 16 pl. 29. By Heir of one of Wives, where Recovery by ſeveral Husbands and Wives, 17 pl. 30. Not after Diſclaimer, but after Departure in Deſpite of Court, 17 pl. 31. By Biſhop and Incumbent, 17 pl. 32. By Adminiſtrator of Defendant, though Execution ſued by *Elegit*, 17 pl. 33. By Executor to reverſe Attainder of Felony, 17 pl. 34. Againſt Executor to avoid Judgment for the Damages only, 17 pl. 35, 36. Whether by Alienee of Perſon attainted, 17 pl. 37. Principal and Bail cannot join any more

more then Tenant for Life, and him in Remainder, 18 pl. 38. Not by Heir on Judgment againſt Anceſtor, till Lands extended, 18 pl. 39. By them only againſt whom Judgment given, 18 pl. 41. Only againſt Privies, but *Sci. fa.* muſt go againſt Tertenants, 18 pl. 1, 2, 3. Bears Teſte before the Judgment given, 19 pl. 1. On Judgment in *Quare impedit* before Damages inquired of, 19 pl. 2. 20 pl. 11. 21 pl. 16. So in Coſinage or Aiel, 19 pl. 3. Not upon firſt Judgment in Account, 19 pl. 4. Not on Award of Court before Original determined, 19 pl. 5, 6. Not on firſt Judgment in Partition, 19 pl. 7. On ſigning before Judgment entred, 19 pl. 20. On Judgment in Ejectment, or Debt before Damages inquired, but not ſo in Caſe, 20 pl. 10. 21 pl. 14, 15. Before Execution ſued againſt him or not, 20 pl. 12. 21 pl. 13. By Infant for Reverſal of Common Recovery after he is of Age, 21 pl. 18. Where Remainder may or not, during the Life of the Tenant for Life, 22 pl. 19. 20. 21. Where Judgment againſt one, he ſhall not have Error till Matter determined as to other, 22 pl. 22. So where in a *Formedon* Tenant has Judgment for Part, 22 pl. 23. Not on Judgment *quod computet*, 22 pl. 25. But in Debt againſt ſeveral, by ſeveral *Præcipe's* and Judgment againſt one, he may bring Error, 22 pl. 25. But on Judgment in *Quo Warranto* for Seiſure of Part of Liberties, Error lies, 22 pl. 26. To whom directed, 23 pl. 1. Writ varies from Record and amendable, 23 pl. 1. Such Variance material or not, 23 pl. 2, 3, 10. 25 pl. 14. Error on Judgment in Aſſiſe, muſt take Notice of Adjournment in *B.* 23 pl. 5. But on Judgment in *Quare imp.* at *Niſi prius*, need not mention where Judgment given, 24 pl. 6. Title not ſhewed in Writ of Error, 24 pl. 7, 8. Certainty therein, 24 pl. 10, 11, 12. Dead Party to be named in Writ, 24 pl. 13. Variance in Direction to Court, 25 pl. 15, 16. 25 pl 1. The Record or Tranſcript removed, 26 pl. 1, 2, *&c.* On Error on Judgment in *B.* Body of Record only certified, 26 pl. 6. Original, *&c.* not certified till Error aſſigned for want of them, 26 pl. 6. On Error of Judgment in *Ireland*, when Record ſhall be ſaid removed or not, 27 pl. 8. Verdict quaſhed for Inſufficiency to be certified, 27 pl. 11. *Quod coram vobis, &c.* 27 pl. 1, 2, *&c.* Lies where Record removed tho' Writ abated, 27 pl. 1. And when the Record is ſo removed, 28 pl. 3, 4. Writ *quod coram, &c.* awarded by Court, where Record returned, 28 pl. 9. Record not removed by Error by Principal and Bail on Judgment againſt Principal, 28 pl. 10. So if by Bail upon both Judgments, removes not Principal, but that againſt Bail, ſo that a Writ *quod coram, &c.* lies, 29 pl. 11. If two Bills, that which agrees with Record intended true one, 48 pl. 12. That Jury were *jurati ad veritatem*, but *dicendam* omitted, 50 pl. 1. Part only actionable, and Damages intire, 50 pl. 2. 51 pl. 3. 51 pl. 8. Miſcaſting, Error or not, 51 pl. 4, 5. Damages given for more than in the Nar', 51 pl. 7. Want of *Capiatur* or *Miſericordia*, or Miſtake of one for the other, Error, 53 pl. 1, 2, *&c.* 54 pl. 5, 6, *&c.* 35 *l.* Damages given, and Judgment *quod recuperet damna præd' ad* 37 *l.* not Error, 54 pl. 13. 58 pl. 34. *Quod recuperet debita*, inſtead of *damna*, Error, 55 pl. 14. But *damna* includes Coſts, 55 pl. 14. But not where Jury give 2 *d.* Damages, and 2 *d.* Coſts, and Judgement given to recover *debitum & damna præd'* to 2 *d.* 55 pl. 17. Judgment given for Part only, 56 pl. 20. *Conceſſum videtur, &c.* for *Conſideratum*, Error, 56 pl. 21. So if *conſideratum, conceſſum*, 56 pl. 22. *Recuperaret* for *recuperet*, Error, 56 pl. 23. Damages aſſeſſed *occaſione infraſcript'* as well as *occaſione detentionis debiti*, 57 pl. 29. Not reverſed for Part where Writ bad, 61 pl 1. So in Treſpaſs, if Judgment againſt three, and one dead, whole reverſed, 62 pl. 2. Damages ſeveral, and reverſed for Part, 62 pl. 3. Or not, 62 pl. 4. Reverſal as to the antient Demeſne Lands only 62 pl. 5. Want of *Miſericordia* as to Part, reverſes whole, 62 pl. 6. Judgment as to Land in Dower not reverſed for Fault as to Damages, 63 pl. 7. So Judgment for Writ to Biſhop not for Fault as to Damages, 63 pl. 8. For Infancy of one Defendant, whole reverſed, 63 pl. 9. So if one Defendant Feme Covert, 63 pl. 10. Firſt Judgment in Account not reverſed for Fault in laſt, 63 pl. 11. And *vide* like Caſe, pl. 15. But upon Error by Infant to reverſe a Fine levied by him and others, it ſhall be reverſed as to the Infant only, 64 pl. 13. By Reverſal of firſt Judgment, Judgment in *Rediſſeiſin* is ſo, 64 pl. 1. By Reverſal of Judgment, the Judgment in Debt, or Outlawry thereupon reverſed, 64 pl. 2, 3. But by Reverſal of Outlawry Judgment is not, 64 pl. 4. Judgment in *Sci. fa.* reverſed by Reverſal of firſt Judgment, 64 pl. 5, 6. Judgment in *Quare non admiſit* by Reverſal of Judgment in *Quare impedit*, 65 pl. 7. Judgment againſt Pledges by Reverſal of principal Judgment, 65 pl. 8. Judgment againſt Tenant by Reverſal of Judgment againſt Vouchee, 65 pl. 9. Attainder of Acceſſory by Reverſal of Outlawry of Principal, 65 pl. 10. Execution not reverſed by Reverſal of Judgment againſt Garniſhee, 65 pl. 1. Judgment for Eſcape con-

continues, though Judgment upon which reverſed, 67 pl. 5. Collateral Things executed, not deveſted by the Reverſal of Judgment, 67 pl. 6. Otherwiſe of Things executory, 67 pl. 7. By Reverſal of Outlawry, Preſentation to Church not avoided, 67. pl. 9, 10. After Reverſal 'tis no Record, 67 pl. 8, 12. Judgment againſt Bail not reverſed by the Reverſal of that againſt Principal, 67 pl. 13. Not appearing how much was Meadow and how much Paſture in Formedon, Error, 68 pl. 3. Error helped by Verdict, 72 pl. 1. As in Action againſt Baron and Feme, for Words ſpoke by both, and Baron only found guilty, 72 pl. 1. In Battery by them for beating both, and Defendant found Guilty as to both, and ſeveral Damages, *&c.* 73 pl. 2. So if found Not guilty as to beating the Huſband, and Guilty as to the Wife, 73 pl. 4. So in Battery againſt Baron and Feme, the Baron is found Not guilty, and Feme Guilty, 73 pl. 5. Error helped by pleading, 73. By not taking Challenge, 73 pl. 2. 74 pl. 3, 4. By not pleading Frankfee, 74 pl. 5. Not that the Demandant was an Alien, 74 pl. 6. Defect in Writ helped by Pleading to it, as want of *quam clamat eſſe jus*, 74 pl. 11. So Uncertainty in the Count, 74 pl. 12. Want of Warrant of Attorney, 76 pl. 1, 2. Miſdemeanor of Jury, 76 pl. 3. *Conſenſus tollit errorem*, 82. As if Appearance by Attorney where it ought not, 82 pl. 1, 2. 90 pl. 8. Place of Trial altered by Conſent, 83 pl. 1, 2. But ſuch Conſent muſt be entered on Record, 83 pl. 3. Whether ſo altered in an Ejectment, 83 pl. 4. *Venire* awarded to Coroners, or *Viſne* from a wrong Place by Conſent, 83 pl. 5. Error in Parliament, 87 pl. 1, 2. For proceedings in Parliament, 87 pl. 3. One of Age ſueing by *Prochein amy*, Error, 90 pl. 9. Inquiry of Pleas in Aſſiſe before Tenancy inquired of, Error, 90 pl. 9, 10. Error where Plaintiff is one of the Judges, 91 pl. 11. Where it appears Action was brought before Time, 91 pl. 12 Want of Warrant of Attorney, 91 pl. 13. If it appears by Plaintiff's own ſhewing, he had no Cauſe of Action, 91 pl. 14. Proceeding without *Procedendo in loquela*, Error, 91 pl. 15. Duplicity of Pleading no Error, 91 pl. 16. Where want of Pledges Error or not, 92 pl. 17, 18, 19. Error in Proceſs, 93. By one Writ being awarded for another, 93 pl. 1, 2, 3. Want of Summons Error, 93 pl. 4. If not made good by Appearance, 93 pl. 7. Non-Summons according to the Stat. 31 *El.* not Error, if Sheriff returns *quod ſummonit'*, *&c.* 93 pl. 5, 6. Suit by Plaint in real Action Error, 94 pl. 11. What ſufficient Return of *Dedimus*, 94 pl. 13, 14. Miſtake in Label not Error, 95 pl. 15. But *Dedimus* bearing Date after Return of Writ of Covenant, Error, 95 pl. 16. Power in the *Dedimus* is not purſued, 95 pl. 18. Caption taken after the Return of the Writ of Covenant, 95 pl. 19. *Dedimus* bearing Date long before the Writ of Covenant, and Doubt whether Fine preſumed thereupon, 95 pl. 20. Not appearing by what Authority inferior Court held, Error, 96 pl. 21. Variance between the Writ and Plaint, 96 pl. 22. Pleading that he was ſeiſed *ut de feodo & jure per formam*, *&c.* not Error, 97 pl. 24. The Want of *Et petit quod querens reſpondeat*, no Error, 97 pl. 25. *Diſtringas Jurator' Summonit' in Cur' noſtra*, where *Venire* in Time of Predeceſſor, Error, 99 pl. 1. Where Writ recited as directed *Vicecomiti noſtro*, and it was in Time of Predeceſſor, 99 pl. 2. Part omitted in Return of *petit Cape*, and yet Judgment given for it, 99 pl. 3. Fine levied by Sheriff upon Covenant directed to Coroners, not Error, 99 pl. 4. Inquiry how executed in inferior Court, 99 pl. 5. Where Jury returned by *W.* and *J.* and not appearing whether they were Sheriffs, 100 pl. 6. Number and Names of Jury muſt appear upon Return of *Venire* in inferior Court, 100 pl. 7. Return of *Venire* in inferior Court muſt be *per miniſtros Cur'* 100 pl. 8. *Diſtringas & apponere* thereto *decem Tales*, Error, 100 pl. 9. *Venire* returnable ſame Court where Error, 100 pl. 10. Where Proceſs againſt three, though one dead, and Trial had, not Error, if ſuggeſted before Judgment, 100 pl. 11. *Venire* to Coroners, and *Tales de Circumſtantibus* returned by Sheriff, 101 pl. 12. Want of Sheriff's ſetting Name to Return, 101 pl. 13. In inferior Court not ſaid the *Venire* was awarded *per* or *ad Curiam*, 102 pl. 1, 2. Entry upon the Roll, that *Elegit medietatem terrar'*, *&c.* without ſaying of Defendant, 102 pl. 3. *Venire* in inferior Court awarded to Serjeant, without naming him, not Error, 102 pl. 1. Entry *quod quidam Juratores venerunt, & quidam non, &c.* without ſaying how many, *&c.* 102 pl. 2. Entry *in Aſſiſe quod quidam Jurator' habuerunt viſum quidam non, &c.* without ſaying *quot*, 103 pl. 3. Entry in inferior Court, *ideo venit inde Jurata*, without ſaying out of what Place, Error, 103 pl. 4. 103 pl. 6. *Venire*, *&c.* to inquire *de vero debito* by Cuſtom, not Error, 103 pl. 5. *Venire* awarded *de Burgo* good, 103 pl. 6. Where but 21 Jurors returned on *Venire*, 104 pl. 8. The Chriſtian Name of one Juror miſtaken in the *Habeas Corpora*, 104 pl. 9. Error, unleſs ſix Aliens and ſix Denizens, 104 pl. 10.

Venire awarded in *Durham*, without ſaying of what Place, becauſe County Palatine, 104 pl. 11. Want of awarding of what Place Jury ſhall come, helped by Entry of Return, 104 pl. 12. *Proborum & legal'*, not *hominum*, Error, 105 pl. 1. That Jury *dixerunt pro quer'*, *&c.* Error, 105 pl. 2. So *aſſiderunt damna*, 105 pl. 3. Jury inquire of but one Iſſue, 105 pl. 4, 6. Inquire but of Part, 105 pl. 5. Two Defendants join ſeveral Iſſues, and one only inquired of, 106 pl. 7. Judgment for Damages in Dower without finding Husband died ſeiſed, 106 pl. 8, 9. Uncertainty in Verdict, 106 pl. 10. Defendant found Guilty, without what Number or Sort of Cattle, 107 pl 11. *&c. Venire* to Return 24. in inferior Court, Error, 107 pl. 1. Otherwiſe if *Venire* to Return 12. and in ſame Precept *habere Corpora*, 24. 107 pl. 2. Want of Return of Names of Jury in inferior Court, Error, 107 pl. 3. *Per quos rei veritas melius Scire*, not *Sciri*, 107 pl. 4. Alteration of Form of *Venire* in inferior Court, Error, not in ſuperior, 108 pl. 5. Awarded *de balliva Vicecom'* in inferior Court, Error, 108. pl. 6. *De Warda*, without ſaying *infra Juriſdict'*, 108 pl. 7. Where *impanellati electi, &c.* referred to Court, not Sheriff, 108 pl. 8. Where *ad triandum exitum*, and not *tam ad triandum exitum quam ad inquirendum de damnis*, 108 pl. 9,

Eſtoppel. Vide **Error.**

What is directly contrary to Record, not aſſignable for Error, 33 pl. 1, 2. Nor what is admitted by pleading, 90 pl. 5. Diminution not contrary to Record certified, 45 pl. 1, 2.

Execution.

In *Ireland* how upon Judgment affirmed here, 27 pl. 8. In *B. R.* upon Judgment affirmed in Parliament, 27 pl. 10.

Guardian. Vide **Appearance.**

I.

Infant. Vide **Appearance.**

ERror how brought and aſſigned by Infant, 13 pl. 4. 18 pl. 40. 31 pl. 7. Error for Reverſal of Common Recovery after of Age, 21 pl. 18. For Infancy of one Defendant, whole Judgment reverſed, 63 pl. 9. But Fine ſhall be reverſed as to Infant only, 64 pl. 12. Recovery in Dower by Default againſt Infant, not Error, 98 pl. 3. But by Default againſt one in Priſon is, 98 pl. 31. Miſtake in Jurors Name *Broke* for *Brook*, not Error, 98 pl. 1. Cannot avoid Common Recovery by Entry, but Error, 3 pl. 1.

Judgment.

Death of one Plaintiff or Defendant ſuggeſted, and Judgment had, 32 pl. 4, 5. 50 pl. 1. At what Time, though Plaintiff dead, 52 pl. 2. Death after Verdict, and before Day in Bank, 52 pl. 3. 53 pl. 6. Baron dies, and Judgment againſt Feme only, 52 pl. 5. Judgment againſt three Executors, where one before dead, not Error, 53 pl. 7. Want of *Capiatur*, Error, 53 pl. 1, 4. So if one where there ought not, 53 pl. 2. So of an Amercement, 53 pl. 3. 54 pl. 5, 7. So where amerced and *Capiatur* both, 54 pl. 9, 12. And in thoſe Caſes the Error is in the whole Judgment, 54 pl. 10, 12. Judgment againſt Ingroſſer *quod Capiatur*, *&c.* well enough, for the, *&c.* ſupplies the two Months, 54 pl. 11. *Quod recuperet damna & Cuſtagia & 40 s. de incremento*, good, and refers to the Coſts, 55 pl. 16. Judgment *pro incremento*, muſt be *ad requiſition' quer'* or *ex aſſenſu partium*, 56 pl. 19. *Unica fiat Executio*, But Form and for the Direction of Clerks, 56 pl. 25. *Quod* Defendant *eat ſine die*, and not *quod ſit quietus*, 57 pl. 26. Omiſſion of *ceſſet executio*, till Plea of other is determined, not Error, 57 pl. 27. Diverſity of Form as to Coſts in *B.* and in *B R.* 57 pl. 28. *Quod* Defendant *remaneat indefenſus*, though not ſaid againſt Plaintiff good, 57 pl. 30. *Ideo conſiderat' eſt per Seneſchallum*, well, 57 pl. 32. But *ideo conſideratum eſt*, without ſaying *per Seneſchall'*, or *Cur'*, is naught, 58 p. 33. But in ſuperior Court, the Form only *ideo conſiderat' eſt*, 58 pl. 35. *Ob quod conſiderat' eſt*, good, 58 pl. 36. *Recuperare debeat*, 58 pl. 37. What Judgment in Error, 59 pl. 1. Where the Plaintiff ſhall be reſtored to his Original, 59 pl. 1, 2. 109 pl. 2. To his Action, 59 pl. 4, 5. *&c.* To his Land, 110 pl. 4. To all that he hath paid, 110 pl. 6, 7. After Reverſal, ſuperior Court ſhall proceed as inferior ſhould, 59 pl. 8. 109 pl. 2, 3. On Reverſal ſame Judgment given as ought to have been, 60 pl. 1, 2, 3. 109 pl. 1. Judgment reverſed in *Cam' Scac'* Record remanded, and *B. R.* award Inquiry, *&c.* 61 pl. 4. Judgment in Huſtings reverſed before Commiſſioners at St. *Martins*, they give Judgment, Huſtings ſhould, 61 pl. 5. Upon Errror by Plaintiff Judgment reverſed, and new Judgment againſt him, 110 pl. 8. Form of Entry of Judgment for Reverſal, 110 pl. 9, 10.

An INDEX.

O.

Outlawry.

WHere to be reverſed by Plea, and where by Writ of Error, 3 pl. 1. 4 pl. 6. 7 pl. 4, 5, 6. 5 pl. 1, 2. 6 pl. 3, 4. *&c.* For what Cauſes reverſed, 4 pl. 1, 2, 3. *&c.* Not avoided without Error, though Statute ſays it ſhall be void, 5 pl. 7. Unleſs where ſuch Writ would not be agreeable with the Record, 5 pl. 8. *Superſedeas* delivered before Exigent pronounced, makes Outlawry erroneous, 94 pl. 8. So tho' never delivered to Sheriff, 94 pl. 9. So if Exigent pronounced after pardoned, 94 pl. 10.

P.

Parliament. Vide Error.

ERror brought there, 82.

Pleading.

In Error to reverſe Outlawry, King ſhall not plead *in nullo eſt errat'*, but Day given to maintain Outlawry, 44 pl. 1. *In nullo eſt errat'* in Nature of Demurrer, confeſſes Fact well aſſigned, 44 pl. 2, 3, 4. *In nullo eſt errat'*, a good Plea where collateral Matter of Record aſſigned, and Plaintiff muſt procure it to be certified, 44 pl. 5. Fine and Non-claim pleaded in Bar of Error, 48 pl. 1. Releaſe or Baſtardy pleaded by one privy, though not Tenant of the Land, 48 pl. 2, 3. So a Releaſe of Right, *&c.* though he hath none, 49 pl. 4. So Tertenant, though not privy, may to *Sci. fa.* plead Releaſe, Baſtardy, *&c.* 49 pl. 5, 6. But Tertenants can only plead in Bar of Writ of Error, not in Abatement, 49 pl. 7. Where one may plead Non-tenure to diſcharge himſelf, but not in Abatement, 49 pl. 7. By Heir after he comes of Age, though Judgment before reverſed as to Tertenants, 49 pl. 1. What a good Plea in Bar of Error, 84. Not Feoffment before the Judgment, 84 pl. 6, 7, 8. Nor Nonſuit before, 84 pl. 9. But Feoffment after is a Bar, 85 pl. 10. But where made of Part, a Bar as to that Part only, 85 pl. 10. Nonſuit no Bar to new Writ of Error, 85 pl. 11, 12. By Fine levied by Infant after Inſpection, and before the firſt Fine reverſed, 85 pl. 13. Erroneous Fine pleaded in Bar of Error, brought upon another, 85 pl. 14. Common Recovery Bar to Error on Fine, 85 pl. 15. Entry into Part pending Error, no Bar, 85 pl. 17. Fine and 5 Years Non-claim, no Bar to Error upon that Fine, 86 pl. 18. Bar by Plaintiffs Purchaſe of the Land after Judgment, 86 pl. 1. By his Acceptance of Leaſe barred during Term, 86 pl. 2. To Error by King, Seiſure by his Commiſſioners, no Bar, 86 pl. 3. But Recovery or Releaſe of Part, Bar as to that Part only 86 pl. 1, 2. Error helped by Pleading, 73, 74.

Pledges. Vide Error.

Want thereof Error, 92 pl. 17, 18.

Proceſs. Vide Error.

One Writ awarded for another, 93 pl. 1, 2, 3.

R.

Releaſe.

ERror avoided thereby, 77. Plaintiff may releaſe Damages and Coſts in Annuity, and take Judgment, 77 pl. 1. 78 pl. 7. Debt upon a Bond, and a *Mutuatus* againſt Executor, Plaintiff may releaſe Damages and Money upon the *Mutuatus*, *&c.* 77 pl. 2. May Releaſe Damages in Ejectment, and take Judgment for Land, 77 pl. 4, 5. Or for what Ejectment properly lies, 77 pl. 4, 5, 6. 81 pl. 1, 2, 3. Error avoided by ſpecial Entry *nullo habito reſpect'*, 78 pl. 8. Though one Bond not due, Plaintiff releaſing Coſts and Damages may take Judgment on that which is due, 78 pl. 9. Releaſing ſuch Part as not good, may have Judgment for reſt, 78 pl. 10, 11. In Debt for Rent, if it appears that the Plaintiff hath demanded too much, he may releaſe it, and take Judgment for what due, 79 pl. 1. Where on joint Treſpaſs ſeveral Damages are given, Plaintiff releaſing all but one Set, may take Judgment, 79 pl. 1. Releaſe one Treſpaſs and take Judgment for another, 80 pl. 2. Relinquiſh Action againſt one, and take Judgment againſt other, 80 pl. 3. Releaſe Iſſue not inquired of, and take Judgment for the other, 80 pl. 4. Judgment for Part in Waſte, without Inquiry of Reſt, 82 pl. 1, 2. What Releaſe Bar of Error, 84 pl. 1. 2. Of all Actions, 84 pl. 3, 5. Of all Right, 83 pl. 4. Of all Suits, 85 pl. 16.

Removal *de Record*. Vide Error.

RECORD it ſelf, or Tranſcript only removed, 26 pl. 1, 2. When Record ſaid to be removed out of *Ireland* or not, 27 pl. 8. Record removed, though Writ abated, 27 pl. 1. 29 pl. 15. By Error brought by Principal, and Bail on principal Judgment,

Record not removed, 28 pl. 10. Error by Bail upon both Judgments, removes that againſt Bail only, 29 pl. 11. Not where Damages in Writ of Error mentioned, varies from Judgment, 29 pl. 12. By Error of a Judgment in *Curia noſtra*, where it was in Time of Predeceſſor, Record not removed, 29 pl. 13. Where Writ and Record vary, not removed, 29 pl. 14. 30 pl. 17. Upon Error in *Cam' Scac'*, a Tranſcript only removed. 30 pl. 16. Where ſo removed, that a Writ *quod coram vobis*, *&c.* lies, 27 pl. 1, 2.

Reſtitution.

Upon Reverſal reſtored to the Land, 66 pl. 1. To the mean Profits, 66 pl. 2, 3. Not to the Term ſold on *Fi. fa.* but to the Money for which ſold, 66 pl. 1. Otherways where ſold upon Outlawry, 66 pl. 2. To Term or Goods not ſold on *Elegit*, but delivered to Plaintiff *per rationabile pretium*, 66 pl. 3, 4.

Reverſal. Vide **Error.**

Of Whole or Part only, 61, 62. By Reverſal of one Judgment, another reverſed, 64, 65, *&c.* After Reverſal 'tis no Record, 68 pl. 8, 12.

S.

Scire facias.

AGAINST Tertenants in ſeveral Counties in Nature of ſeveral Actions, and upon Error brought upon a Judgment in one, Error cannot be aſſigned in other, 31 pl. 8. Bail may plead Death of Principal before Judgment, 1 pl. 4. 34 pl. 2. *Scire facias quare Execution', &c.* where made Part of firſt Record or not, 40 pl. 1. No *Sci. fa. ad audiend'*, before Errors aſſigned, 42 pl. 1. No *Sci. fa. ad audiend'*, *&c.* when in Matters aſſigned, no Colour of Error 43 pl. 1, 2. *Sci. fa.* againſt Tertenants how awarded, 43 pl. 1. No *Sci. fa.* againſt the Recoveror, when Error brought to reverſe Outlawry upon Judgment in Aſſiſe, 43 pl. 1. Otherwiſe if to reverſe the Judgment, 43 pl. 2. Upon Reverſal of Outlawry, when againſt Lords *mediate* and *immediate*, 43 pl. 1. Where upon Reverſal of an Outlawry, 44 pl. 3, 4, 5. Againſt Tertenants upon Reverſal of Recovery. 44 pl. 6. May be before or after Errors examined, 44 pl. 6.

T.

Term.

RECORD during Term in Breaſt of Court, and alterable, 13 pl. 15, 16.

V.

Verdict. Vide **Error.**

WHERE Error is helped thereby, 72 pl. 1, 2. *&c.* Where erroneous Joining of Baron and Feme in Action, helped by Verdict, 72, 73.

Void and Voidable.

Judgment againſt dead Perſon voidable only, 1 pl. 1, 2, 3. So if entered in improper Form, 1 pl. 5. Fine or Recovery without Original only voidable, but if after *retraxit* void, 2 pl. 6. Render by Fine to one no Party to Original, voidable only, 2 pl. 9.

FINIS.

(e) Error.

(e) It lies where a Man is grieved by any Error in the Foundation, Proceeding, Judgment or Execution. Co.Lit. 289.b.

(A) (a) In what Cases an erroneous Judgment may be avoided by Plea, without Writ of Error.

(a) Where by Error, and where by Audita Querela. My 1st Part 633. D. 1. inMargine.

1. (b) If the Tenant in a Cui in Vita dies seised pending the Writ, and after Judgment is given against him, which is erroneous, and after the Recoveror sues Execution against the Heir, and he brings an Assise; he shall not avoid this Judgment against his Father, by saying, that his Father died pending the Writ; but he is put to his Writ of Error; for the Judgment is not void, but only voidable. (c) 28 Ass. 17. adjudged. 32 E. 3. Ass. 99. Curia.

Fol. 742.

(b) 2 Bulst. 242. S. P. per Coke argu-endo.

(c) Br. Error 123. S. C. Fitzh. Error 267. S. C. 1 Rol. Abr. 768. Pl. 4. S. C.

2. If a Man recovers in an Ejectione firmæ, and after his Executor sues Execution by Scire facias against the Recoveree, the Recoveree cannot avoid the Judgment nor stay Execution by saying, the Testator died between Verdict and Judgment, or such like; but he is put to his Writ of Error, (d) for the Judgment is only voidable. Mich. 15 Jac. B. R. between Hide and Markham, which concerned the Earl and Countess of Shrewsbury. Adjudged per Curiam: And by the Clerks; such Pleas have been several Times disallowed.

(d) That this was Error before the Statute of 17 Car. 2. vide 1 Rol. Abr. 768. Pl. 3. with the Notes thereupon.

3. So if a Man recover Lands in any real Action, and after sues Execution against the Heir of the Recoveree, by Scire facias; it is not any Plea for the Heir to say, that his Father died pending the Writ, but he is put to his Writ of Error. 28 Ass. 17. by Mowbray admitted.

4. If a Man recover against the Principal, and sues a Scire facias against the Bail, they cannot say the Principal died before the Judgment, and so avoid the Judgment by Plea; for it is against the Record. Mich. 32, 33 El. B. R. between (d) Warter Plaintiff, and Perry and Spring Defendants. Per Curiam.

(d) My 2d Part 83. Pl. 2. S. C. and S. P. seems contrary. Cro. Eliz. 199. S. C. and at first held no Plea, but after the Plea was received, because the Bail could not have Error to reverse the Judgment. 2 Leon. 101. By all the Judges except Wray, it cannot be pleaded, but there said, it was ruled the Defendants should swear their Plea. 2 Mod. 308. S. C. cited, and said it was a good Plea by way of Excuse for not bringing in the Body, but not to avoid the Judgment, being a Record which must be avoided by Writ of Error; and vide Godb. 377. my first Part 674. Pl. 2.

5. In an Action upon the Case, if the Plaintiff be nonsuit, and after it is entered, that he reliquit actionem suam & fatetur se nolle ulterius prosequi, upon which Costs are assessed, though it be admitted that this Judgment is erroneous, because this is not any Nonsuit as it is entered; yet in an Action of Debt for the Costs, the Defendant shall not avoid it by Plea without a Writ of Error; for it is a

(e) Cro. Jac. 213. Judgment de Facto, not void, (e) but only voidable by Writ of Error. Mich. 11 Jac. B R. between Coles and Lowe; adjudged.

6. If any of the Proclamations upon a Fine be entered to be made upon a Sunday, out of Term, or upon the 31st of June (there never having been any such Day) they may be avoided by Plea, or Writ of Error. *Mich.* 4 and 5 *Eliz. Fish* and *Brocket*, *Pl. Com.* 266. *Dyer* 181, 182.

(f) An Outlawry, Fine, or Recovery without an Original, if within the Jurisdiction of the Court, shall bind for the Time, and are to be reversed by Error; which proves they are not void. Keilw. 19. b. 98. a. 10 Co. 77. a. Co. Lit. 352. b. But if an Original be brought and a Retraxit entered, and after a Concord made, or Fine levied, 'tis void, in regard the Truth appears of Record. Co. Lit. 352. b. A Judgment in the Marshalsea, where none of the Parties were of the King's Hostel was void, and being Coram non judice might be avoided by Plea. 10 Co. 77. a. 1 Brownl. 24. and vide 1 Lev. 23, 204, 234. and under Justification, Title Trespass. Yet Error lies to reverse such Judgment. Baptist and Michelburn. Cro. Eliz. 502. 6 Co. 20. and vide 1 Rol. Abr. 744. Pl. 3. 2 Jon. 209. Savil 36. If Judgment final be given in a Writ of Right where it ought not, it shall bind till reversed. 5 Co. 86. a. Resolved.

7. If a Fine is levied (f) without an Original, or of more than is contained in the Original, it is not void, but only voidable by Writ of Error. 2 *Inst.* 513.

8. If one be attainted upon an erroneous Indictment, he cannot be relieved but by Writ of Error; for the Judgment being *quod suspendatur, &c.* which is the Judgment of Law due for the Offence; it must be presumed to have been given, for that he was guilty of the Offence. (g) But if Judgment of Acquittal is given upon such Indictment, the King need bring no Writ of Error; but the Offender may be newly indicted; for the Judgment being *quod eat sine die, &c.* may be given as well for the Insufficiency of the Indictment as for the Party's Innocency. 3 *Inst.* 214.

(g) Where auterfoits acquit is a good Plea, vide under the Division of Title Offences.

9. If *A.* levies a Fine to *B.* who grants and renders to *A.* and his Wife, and the Heirs of the Body of *A.* this is not void as to the Wife, though she is no Party to the Original, but only voidable by Writ of Error. 3 *Co.* 5. *a.* Resolved.

10. If one is attainted of Felony, and after by relation of a general Pardon the Felony is pardoned, he shall be discharged; for he hath no Remedy by Writ of Error, or otherways, to reverse the Attainder. 6 *Co.* 14. a.

11. If a Fine imposed in a Leet be unreasonable, or against Law, as joint where it should be several, it may be avoided by Plea and Judgment of the Court in which the Suit is depending; for there is no other Remedy. (h) *Godfry's* Case. 11 *Co.* 44. b. Resolved.

(h) 1 Rol. Rep. 75. S. C. and S. P. vide 2 Mod. 219.

12. In Debt upon a Bond against an Administrator, if he pleads a Judgment recovered against the Intestate, and that he hath not *Assets ultra, &c.* the Plaintiff may reply, that an Action was brought against the Intestate, and that he died before the said Judgment, and that after his Death Judgment was given; for being a Stranger to the Judgment he can bring neither Error nor Deceit, and has no Way to avoid it but by Plea. *Trin.* 30 *Car.* 2. *Randal's* Case. 2 *Mod.* 308. Adjudged the Plaintiff might avoid the Judgment without a Writ of Error, especially in this Case, where it is not only (i) erroneous but void.

(i) Where an erroneous Judgment may be pleaded in Bar of such Action. Vaugh. 94. But for this vide the Divisions under Title Executors.

(B) In what Cases an erroneous Judgment may be avoided by Entry, without a Writ of Error.

1. If an Infant ſuffers a Common Recovery, in which he comes in as Vouchee in his proper Perſon, and not by Attorney or Guardian, though this ſhall not bind him, but that he may in a Writ of Error avoid it, becauſe it is Error in Law; yet at his full Age he cannot enter into the Land and avoid it by his Entry, before he has revers'd it in a Writ of Error, becauſe he himſelf is privy to the Judgment, and may reverſe it by ſuch Means; and he is not a Stranger to the Judgment; for Judgments ought not to be ſubverted by Matter in Pais without Matter of Record; as a (*) Recognizance or Fine by an Infant, nor any Judgment in other Actions given againſt an Infant, where he appears by Attorney and not by Guardian. Hill. 1650, between (a) Ayleff and Walker. Adjudged per Curiam, upon a Special Verdict for Land in Eſſex. Intratur Trin. 1649. Rot. 200.

(*) Fol. 743.

(a) Style 246. S. C. Adjudged per totam Curiam Notes there.

am niſi. My 2d Part 773. Pl. 2. S. C. 2 Rol. Abr. 395. Pl. 6. S. C. which vide with the

(C) In what Caſes Judgments ſhall be reverſed without a Writ of Error.

In what Court.

1. In Banco Regis in no Caſe, neither in the ſame Term, nor in another Term, ſhall an Outlawry be reverſed without Writ of Error on the Crown-ſide. Mich. 14 Jac. The Clerks ſaid, That ſo at all Times had been their Courſe, and the Court agreed thereto, and adjudged accordingly. (a) 19 H. 6. 2. Adjudged; and by the Clerks; It is the Courſe.

(a) Fitzh. Error 26. S. C. Diverſity

taken between the Courſe of King's Bench and Common Pleas, where the Outlawed comes in the ſame Term the Exigent is returned. Br. Error 199. S. C. that he that comes in B. by Exigent, may in the ſame Term, by Plea without Writ of Error, reverſe the Outlawry for Matter apparent; as Omiſſion of any Proceſs, otherways for a Matter of Fact. But in both Caſes the Uſage is otherways in B. R. 1 Rol. Rep. 25. per Broom, Secondary. Diverſity between the Courſe of Common Pleas and King's Bench. Cro. Eliz. 274. and vide 2 Rol. Rep. 290. Poph. 181. 2 Inſt. 670.

4. If a Man is found Guilty upon an Indictment of Felony, and prays his Clergy, and it is allowed him, and he is burnt in the Hand, he cannot avoid this by Writ of Error, becauſe he is convicted only and not attainted; but the Record being removed by *Certiorari* into the Crown-Office, if there be a Fault in the Indictment, it may be diſcharged, and Reſtitution awarded to the Party of his Goods ſeiz'd for that Cauſe. *Mich.* 38 and 39 *Eliz.* *Cro. Eliz.* 489, 490. Information being given to the Court, that *Long* was indicted by Practice, and found Guilty upon ſlight Evidence, *&c.* a *Certiorari* was granted; and upon Exceptions taken to the Indictment it was diſcharged, and Reſtitution awarded.

5. If a Man had been indicted upon the Statute of 3 *Jac. cap.* 4. for abſenting from his Pariſh Church, and thereupon Proclamations had been made,

made, that he ſhould render his Body, *&c.* which not being done he had been convicted according to that Statute; yet no Writ of Error would have lain thereupon: For by the Statute after Proclamations made, and the Default recorded, the ſame was a Conviction of the Offence as if a Trial by Verdict had been thereupon; ſo that this was no Judgment, but the Statute gave Proceſs for the Forfeiture; and if there was a Fault in the Record, the Party's Remedy was in the Exchequer to quaſh it there. *Paſch.* 33 *Car.* 12. *Phorbes*'s Caſe. *Raym.* 433. Adjudged upon a Writ of Error upon ſuch Conviction.

6. If the Defendant comes in upon the *Capias utlegatum*, *&c.* he may by Plea reverſe the Outlawry for Matter apparent, as in Reſpect of a (b) *Superſedeas*, Omiſſion of Proceſs, Variance, or other Matter apparent in the Record; yet in theſe Caſes (c) ſome hold, that in another Term the Defendant is driven to his Writ of Error. *Co. Lit.* 259. b.

(b) As if a Superſedeas be delivered of Record to the Sheriff before the Award of the Exigent. 4 Leon. 22. 184. (c) 1 Rol. Rep. 407. per Curiam, and the Clerks; There is a Diverſity where in the ſame, and where in another Term. But vide Dyer 223. Pl. 26. 172. Pl. 11. N. Benl. Pl. 15. Pl. 137. 1 And. 36. Lit. Rep. 150.

7. But for Matter of Fact, as Death, Impriſonment, *&c.* he is driven to his Writ of Error, unleſs in Caſe of Felony; and there, *in favorem vitæ*, he may plead it. *Co. Lit.* 259. b.

(D) (a) For what Cauſe.

(a) For Error in an Outlawry, vide 2 Rol. Abr. 802. Pl. 1, 2, &c.

1. **At the Exigent returned in Banco, if the Defendant ſays the Plaintiff appears by Attorney, and the Attorney has no Warrant, this is not Cauſe to reverſe the Judgment without Writ of Error; for perhaps he hath a Warrant in Chancery.** (b) 11 H. 4. 34.

(b) Fitzh. Utlagary 40. S. C. Br. 11. S. C.

2. **But a Judgment may be reverſed without a Writ of Error for an Outlawry, after a** Superſedeas **and Mainprize.** (c) 11 H. 4. 34. (d) 8 H. 6. 37. 9 H. 6. 8. Contra. Mich. 37 El. b. per Curiam.

(c) Br. Error 11. S. C.

3. **So if the Exigent bears Date before the fourth Day of the** Capias Pluries **iſſued to the Sheriff.** (e) 11 H. 4. 34.

(d) Br. Utlagary 19. S. C.

(e) Br. Error 11. S. C.

4. (d) **A Man outlawed of Felony ſhall not avoid the Outlawry, becauſe he was in Prizon at the Time, without a Writ of Error.** 1 H. 7. 13. b. Contra (f) 7 H. 6. 25.

(d) Co. Lit. 259. b. that it may be pleaded in favorem vitæ. (f) Br. Utlagary 18. S. C.

5. **If a Man be outlawed, where it appears by the Record, that there were not two** Capias's **awarded, this may be annulled without a Writ of Error.** (g) (8 H. 6. 37. 11 H. 6. (h) 11.) **though the Statute ſays it ſhall be void.** Contra M. 37 El. 6.

(g) Br. Utlagary 19. S. C.

(h) This is miſprinted in the Original, as here, and I ſuppoſe ſhould be 15.

6. **So if a Man be outlawed, and no Mention is made of what County he was, this may be reverſed without a Writ of Error.** (i) 8 H. 6. 37. Curia.

(i) Fitzh. Error 19. S. C. Br. Utlagary 19. S. C. per Curiam, Peter Babington Chief Juſtice.

7. (k) If a Man be outlawed without Addition given to him in such Action, in which Action there ought to be an Addition by the (l) Statute, he shall not avoid it by Plea without Writ of Error; tho' the Statute says, that such Outlawry shall be void. 11 H. 6. 15. b.

(k) like Point upon the Statute of 8 H. 6. where no Capias is awarded in the County where the Defendant is supposed to be Commorant by the Indictment or Appeal. 3 Co. 59. b. Hob. 166. 1 Rol. Rep. 159. March 84. (l) For the Exposition of this Statute, vide my Notes thereupon, my 1 Part 236.

8. If a Man comes in Ward upon the Capias utlegatum, he may reverse the Outlawry, because he is named J. S. de A. whereas he was (*) abiding at the Writ purchased at B. and not at A. and this without Writ of Error, because if he should bring a Writ of Error it ought to agree in the Name with the Record, which would be against himself. 19 H. 6. 80.

(*) In the Original it is demurrunt.

9. But otherways it would be if he had rendred himself gratis. 19 H. 6. 80.

10. If a Man comes in Ward upon the Capias utlegatum, he may avoid the Outlawry without Writ of Error, because he is called J. S. de D. where there is no such Vill in the County, because if he should bring a Writ of Error it ought to agree with the Record, and so he should admit that there is such a Vill. (m) 22 E. 4. 38.

(m) Br. Utlegary 22. S. C.

11. (n) If a Man be convicted upon the Statute of 7 Jac. cap. 11. by 2 Justices of the Peace, for killing of Partridges with Nets, upon Proof or Confession of the Party without Indictment, this Judgment may be reversed in B. R. this being removed there by Certiorari without any Writ of Error. Hill. 12 Car. (*) B. R. (o) Berry's Case, per Croke and Berkly, and they seemed in some Manner, that such Conviction upon the (p) Statute for Shooting, or such like, might be so reversed without Writ of Error.

(n) 1 Vent. 33. like Point per Curiam, vide Raym. (*) Fol. 744. 386. where Error was brought upon 13 Hen. 4. 7. being removed

a Conviction of a Riot, before Justices of Peace and Sheriff upon the View, upon (o) 2 Jon. 167. S. C. cited, and a Conviction upon the Statute of Hunting in a Park, by Certiorari, Exceptions allowed to be taken thereto. (p) Vid. 1 Jon. 171.

12. But if an erroneous Judgment be given upon an Indictment of Barretry at the Sessions of Peace, and the Party fined thereupon, and committed till he pays it, and he removes the Indictment and Proceedings by *Certiorari*, and himself by *Habeas Corpus*, yet he cannot be relieved unless he brings a Writ of Error. *Trin.* 14 *Jac. Cro. Jac.* 404. *Rice's* Case adjudged.

13. But a Record of Force made by Justices of Peace upon the View, may be quashed upon Motion without Writ of Error. *Mich.* 15 *Car.* 2. between (q) the King and *Chaloner.* 1 *Lev.* 113. agreed *per Cur'*.

(q) 1 Sid. 156. S. C. and S. P. per Curiam, and said, that a Writ of Error would not lie because they were not a Court.

(E) At what Time a Judgment may be so reversed without Writ.

1. AN Outlawry in Banco Regis (a) in another Term, cannot be reversed without a Writ of Error. (b) 19 H. 6. 2. My Reports 14 Jac. Hamon.

(a) Vide antea c. 6. 7. (b) Fitz. Error 26. S. C. Br. 199. S. C.

2. (c) An Outlawry in Banco Regis may be reversed in the same Term without Writ of Error, for all the Term the Judgment does not remain in pectore of the Judges, this being an Outlawry and Judgment before the Coroner. 19 H. 6. 2. Tr. 14 Jac. B. R.

(c) This seems to be misprinted, and that the Word cannot is wanting, else it is not warranted, but the contrary by 19 H. 6. 2. which vide Fitz. Error 26. Br. 199.

(d) For Matter apparent, not Matter of Fact. Vide antea c. 1.

3. So in the ſame Term an Outlawry returnable in Banco may be reverſed (d) without Writ of Error. (e) 8 H. 6. 37. (f) 19 H. 6. 2.

(e) Br. Utlegary 19. S. C. (f) Fitz. Error 26. S. C. Br. 199. S. C.

(g) Fitz. Error 26. S. C. Br. 199. S. C.

4. But not there in another Term without a Writ of Error. (g) 19 H. 6. 2.

(h) But vide ſupra Letter C. pl. 6. 7. and the Notes there.

5. (h) An Outlawry after a Superſedeas cannot be reverſed in Banco the ſame Term of the Return without a Writ of Error. M. 37 El. B. per Curiam, becauſe this is not their Judgment, but the Judgment of the Coroner.

(F) Upon (a) what (b) Judgment.

(a) Upon a Bill of Exceptions. 2 Inſt. 427.

(b) How an erroneous Judgment given in a Copyhold Court may be reverſed, a Judgment, 288. b. —Upon a Judgment in a Court of Record; not in an inferior Court not of Record. Co. Lit. 288. b.

1. If the Plaintiff be nonſuit at the Niſi prius, upon which Coſts are Taxed by the ſame Jury, by the Statutes of H. 8. and Ja. and Judgment given for them againſt the Plaintiff, the Plaintiff may have a Writ of Error upon this Judgment. Tr. 3 Jac. B. R. admitted per Curiam.

vide my 2 Part. 207. pl. 2. 284. pl. 8. —Without a Judgment, or Award in Nature of no Writ of Error lies, for the Words of the Writ be ſi judicium redditum ſit. Co. Lit.

2. If a Man brings a Writ of falſe Judgment in Banco, upon a Judgment given in ancient Demeſne, and reverſes the Judgment there, a Writ of Error lies upon this Judgment, for this is a Matter of Record. M. 40, 41 El. B. R. by 2 Juſtices.

3. If a Manor Court holds Plea of a Thing out of their Juriſdiction, and gives Judgment thereof, tho' this is void, being coram non Judice, yet a Writ of Error lies, and Error may be aſſigned in this. M. 3 Jac. B. R. between (d) Quarrels and Searle, for by the Writ of Error he ſhall be reſtored to all that he hath loſt, where by the Action of Treſpaſs he ſhall recover all in Damages.

(d) Cro. Jac. 95, 96. S. C. and S. P. adjudged by 3 Judges againſt 1, and

that the Bringing the Writ of Error does not affirm the Juriſdiction, but that it may be ſaid to be a void Judgment, and yet Error lie; as if in a Plea of Land, Judgment be given before Commiſſioners where it ought not to have been tried, but upon an Original Writ Error lies, tho' the Judgment is void. Vide antea A. 1. pl. 7. and the Notes thereupon.

4. If a Man is indicted for Felony, and thereupon a *Capias* and *exigent* is awarded, but he dies before any Attainder, his Adminiſtrators may have Error upon this Award of the *Exigent*, becauſe by the Award of the *Exigent* his Goods were forfeited, and this is *ad grave damnum, &c.* tho' the principal Judgment can never be given. (e) 11 Co. 41. b. cited from the 18 *H.* 7. Rot. 3. *Eaton's* Caſe.

(e) Cro Jac. 357. S. C. cited. 1 Rol. Rep. 85. S. C. cited.

(f) Where attainted by Judgment upon an Indictment, he ſhall not have Error, without Petition

5. If one be outlawed upon an Indictment of Treaſon, Felony, or Treſpaſs, but the Proceſs and Order preſcribed by the Statutes of 6 *H.* 8. cap. 4. & 8 *H.* 6. cap. 10. are not obſerved, the Outlawry may be reverſed by Writ of Error, which (f) *ex merito Juſtitiæ* ought to be granted. 3 *Inſt.* 31. *Ninian Mervil's* Caſe cited to be adjudged.

made to the King. 1 Rol. Rep. 175. per Coke and Dod. — In Caſe of an Attainder of Treaſon. Vide 3 Bulſt. 71. —In Outlawry for High Treaſon is not to be reverſed without Conſent of the Attorney General. 3 Mod. 42. —Where the Queen is Party, the Suit muſt be to her by Petition, in which the Subſtance of the firſt Judgment ſhall be ſet forth; but where Error is in the Proceſs or collateral Matter, and not in the Body of the Judgment, the Attorney General may grant Error without Petition to the Queen, and vide 2 Leon. 194. Sid. 69.

6. A Writ of Error lies to reverſe an Attainder of High Treaſon, (g) tho' ſome have held the contrary, by reaſon of 33 *H.* 8. cap. 20. *That every Attainder of Treaſon by the Common Law ſhould be as effectual as if by Authority of Parliament*, for the Statute is to be intended of lawful Attainders by due Courſe of Law, and not of erroneous or void Attainders; and ſo it was held in a Parliament held the (h) 28 *El.* when it was enacted, That no Attainder of High Treaſon where the Party was executed for the ſame, ſhould be avoided by Plea or Error, but this Act extended only to Attainders before that Time where the Party had been executed, not to Attainders after. 3 *Inſt.* 215.

(g) 3 Bulſt. 71.

(h) For this Statute vide 29 El. c. 20. in the printed Book, but that is falſe, for by the Parliament Roll it appears to be held the 28 El. vide Raym. 1, 2.

7. If one be convicted upon an Indictment of Recuſancy, for abſenting from Church for one Month, upon which Judgment is given that he ſhall forfeit 20 *l.* but it is not *ideo capiatur*, this Omiſſion being apparently to the Prejudice of the King, it was held a Writ of Error would lie, notwithſtanding the Words of 3 *Jac.* cap. 4. That no ſuch Indictment ſhall be avoided, diſcharged or reverſed for want of Form or other Defect whatſoever, (other than by direct Traverſe to the Point of not coming to Church) until after Conformity by coming to Church. *Trin.* 14 *Car.* (i) *Cro. Car.* 504, 505. the Marqueſs of *Wincheſter*'s Caſe adjudged, and upon Error ſuch Judgment reverſed accordingly, the King by his Attorney (k) having ſignified his Pleaſure that it ſhould be reverſed, if erroneous.

(i) By the Report of this Caſe, 1 Jon. 407. the Writ of Error was brought by the King. (k) The King and Lord St. John. 1 Jon. 407. S. C. adjudged, that a Writ of Error lay for the King, for he was not concluded by the Words of the Statute of 3 Jac.

8. If it be entered in an inferior Court, that the Plaintiff *recuperare debeat* whereas it ought to be (l) *recuperare debet*; this is (m) no Judgment, ſo (n) no Writ of Error lies thereupon, for the Words of the Writ are *ſi Judicium reditum ſit. Paſch.* 1659. between *Shedlock* and *La Pere. Stil.* 265. ſuch Writ of Error quaſhed.

(l) Quere if it ſhould not be recuperet.

(m) That it is but an Award. Vide 1 Rol. Abr. 751. pl. 15. (n) Where Judgment was, that he ſhould recover ſuper recuperationem, where it ſhould have been ſuper recognitionem. Yelv. 157.

(G) Of what Judgments.

1. IN Judgments in Pleas upon Patents, Pleas of Debt, Attachment of Treſpaſs, and ſuch like, given in Chancery among them of Chancery, and upon Scire facias upon Recognizances, a Writ of Error lies. (a) 37 H. 6. 14. b. D. 14 El. 315, 100. 11 E. 4. 9.

(a) Br. Error 95. S. C.

2. But no Writ of Error lies upon a Judgment upon a Subpœna in Chancery, for as to this it is not a Court of Record. (b) 37 H. 6. 14. b.

(b) Br. Error 95. S. C.

3. A Writ of Error lies upon a Judgment given in a Franchiſe by Virtue of Conuſance of Pleas. (c) 2 H. 4. 4. b.

(c) Br. Error 32. S. C.

4. No Writ of Error lies upon any (d) Judgment given by the Juſtices of Peace. 4 H. 6. 24.

(d) Vid. antea D. 11, 12.

5. A Writ of Error lies upon a Judgment in Bank. 4 H. 6. 24.

6. Tho' the Authority of Juſtices of *Trailbaſton* was given them by Act of Parliament only, yet if they erred in Judgment, a Writ of Error by the general Rule of the Common Law lay in the King's Bench to reverſe their Judgment. 2 *Inſt.* 540.

(H) In

(H) In what (a) Court.

(a) Tho' Error lies not in B. R. upon a Judgment given in (*) Fol. 745. London, yet it lies upon a Judgment given at Newgate, which is upon Commiſſion in their Seſſions. 2 Leon. 107. ſo held, and vid. 2 Rol. Rep. 97. 2 Lev. 223. (b) 1 Rol. Rep. 287. like Point arguendo. 4 Inſt. 80. S. P. and vid. Moor 570. pl. 778.

1. (b) D. 14 El. 315. 100. **A Judgment given in Chancery upon a** Scire (*) facias **upon a Recognizance, was reverſed** in Banco Regis, **yet both Courts were before the King himſelf.** 29 Aſſ. 47. **adjudged.** My Reports, 11 Jac. B. R. per Coke.

(c) For the Manner of obtaining and proceeding upon ſuch Writ of Error, vide 4 Inſt. 21. Godb. 247. 1 Bulſt. 162. 166. Moor 834. pl. 1122. that this is the dernier Reſort. Vide Caſ. Parl. 33. (d) If a Peer be attainted before the High Steward, and he will bring Error, it muſt be in B. R. 1 Sid. 208. per Twiſden. 1 Lev. 149. per Twiſden and Windham.

2. **It lies in** (c) **Parliament.** (d) 37 H. 6. 13. b. 11 E. 4. 9.

(f) Vide my 1 Part. 793. pl. 2. and the Notes there.

3. (f) **No Writ of Error lies** in Banco or Banco Regis **upon a Judgment given within the 5 Ports.** D. 23 El. 376. 23. **adjudged.**

(g) The Conſtable of Dover. 4 Inſt. 224. but by 2 Inſt. 556. the Conſtable of Dover is alſo Warden of the Cinque Ports. (h) This Court was raiſed by Letters Patents of Edw. 1. 4 Inſt. 224. but 1 Sid. 156. it is ſaid by Twiſden, that no Body knows where this Court is.

4. **But by the Cuſtom of the 5 Ports, a falſe Judgment given there may be reverſed,** per (g) Cuſtodem ſive Guardianum 5 Portuum apud (h) Curiam. Shepeway D. 23 El. 376. 23.

(i) This is miſprinted in the Original, as here, and ſhould be Ed. 4. which vide Br. Error 175.

5. **A Writ of Error lies** in Banco Regis **of a Judgment given in** Lancaſter. 18 (i) El. 4. 12.

(k) As Cheſter 4 Inſt. 214. vide, and the ſpecial Uſage there to examine and correct the Error, and vide 2 Leon. 194.

6. **So of any** (k) **other County Palatine; for this is excepted out of their Charters.** Davis 1. **County Palatine** 62. D. 15 El. 320. 19.

(l) And are Part of England. 4 Inſt. 223.

7. **A Writ of Error lies** in Banco **upon a Judgment in a County Palatine, becauſe theſe Counties** (l) **were derived out of the Crown.** (m) 19 H. 6. 12. (n) 6 H. 4. 4.

(m) Br. Error 74. S. C. that it lies here in England, but not ſaid whether in B. or B. R. Br. Cinque Ports 8. S. C. (n) Q. If this is not miſprinted in the Original, and whether it ſhould not be 2 H. 4. 4. tho neither Place warrants any ſuch Opinion that it lies in B. R.

(o) For this vide my 2d Part. 304. pl. 10. and the Notes there.

8. **If a Judgment be given in the Court of** Stannaries **of the Dutchy** of Cornwal, (o) **no Writ of Error lies upon this** in Banco or Banco Regis, **becauſe it hath not been uſed; but of this there may be an Appeal to the Guardian of the Stannaries, and from him to the Prince, and when there is no Prince, to the King's Counſel.** M. 13 Jac. B. R.

(p) F. N. B. 22 E. S. P. but for this vide 4 Inſt. 356. Kelw. 202. b. Calvin's Caſe, 18. a. 1 Leon. 55. 3 Leon. 159. Yelv. 118. Stil. 386. Vaugh. 290, 402. and per Rol. Rep. 17. it is ſaid per Coke, that Ireland was annexed to the Crown of England by Conqueſt, and therefore, &c. 2 Bulſt. 163. (q) It lies not in the Parliament of Ireland. 1 Rol. Rep. 17. per Coke. (r) Upon a Judgment in Banco there, it muſt be brought in B. R. there, &c. F. N. B. 22 E. Yelv. 118. (s) It lies not upon any Judgment in Scotland, becauſe a diſtinct Kingdom, and governed by diſtinct Laws, Caſ. Parl. 33. (t) Br. Error 127. S. C.

9. (p) **A Writ of Error lies** (q) **in** B. R. **upon a Judgment given in** (r) Banco Regis **in** (s) Hibernia. D. 1. County Palatine 62. (t) 34 Aſſ. 7. **adjudged.** 37 Aſſ. 5.

10. A Writ of Error lies in Parliament upon a Judgment in Banco Regis, given either in a Writ of Error or upon an Action originally commenced there. D. 23 El. 375. 19. (u) 1 H. 7. 19.

(u) Br. Error 137. S. C. with the Manner of Proceeding thereupon.

11. If a Judgment be in any Court in Wales, a Writ of Error lies thereof before the Justices errant (x) 19 H. 6. 12. b.

(x) Br. Error 74. S. C. Br. Cinque Ports. 8. S. C.

12. But no Writ of Error lies thereof in any Court at Common Law at Westminster, because it lies before the Justices errant. (y) 19 H. 6. 12. b.

(y) Br. Error 74. S. C. and if there be no Justices Errant, Quære. Br. Cinque Ports. 8. S. C.

13. And if a Judgment be given before the Justices errant (z) in Wales, no Writ of Error lies thereof in any Court at Westminster, because the Court of Justices errant is as high as any of the King's Courts, except the Parliament. 19 H. 6. 12. b.

(z) Because originally it was no Part of England. 4 Inst. 223. but vide Kelw. 202. b. infra 25. the Statute of 34, and 35 H. 8. and Notes thereupon.

14. But a Writ of Error lies in Parliament upon a Judgment given before the Justices errant in Wales, because the Parliament is more high. 19 H. 6. 12. b.

15. (a) A Writ of Error lies in Banco upon a Judgment given before the Judges of Assise. 11 H. 3. Rot. 7. admit that it was well brought.

(a) Archbishop of York and Morton. S. P. con. 1 Leon. 55. adjudged. 3 Leon. 159. adjudged. Price and Jones S. P. con. Dier 250. adjudged. Moor 78. pl. 208. adjudged. 1 And. 12. adjudged. N. Bendl. 153. pl. 214. adjudged.—That a Writ of Error does not lie in Banco upon a Judgment given in an inferior Court. Cro. Eliz. 26. held by all the Justices.—That a Writ of Error may be returnable in the King's Bench or Common Pleas, at the Pleasure of him that brings it. F. N. B. 20. D. 21 G. Dier 250. Cart. 222.

16. A Writ of Error does not lie in Chancery upon a Judgment given in Banco.

17. But vide 17 E. 3. 5. b. 19. b. 21. where a Writ of Error upon a Judgment in Banco was returnable in Chancery, and there the Record was returned accordingly, and the Chancellor delivered it over to the Chief Justice (b) de Banco Regis. 17 E. 3. 46. 30 E. 3. 14. b.

(b) For Errors in the Common Pleas are to be corrected in the King's Bench, and of the King's Bench, in Parliament. 4 Inst. 22.

18. A Judgment in Assise cannot be reversed by the Chancellor before the Counsel, for this is not any Place for it. 34 E. 3. 14. by the Justices.

19. (c) Upon a Judgment given in the Hustings in London, a Writ of Error lies at St. Martin's (d) before certain Justices. (e) 18 E. 3. 8.

(c) Cole and Green, S. P. appears. 1 Lev. 309. 2 Sand. 253. and that upon the Judgment of the said Justices, a Writ of Error lies in Parliament. vide 2 Leon. 107. (d) For their Commission, &c. vide Reg. 130, 131. F. N. B. 23. E. (e) Fitz. Garranty 23. S. C.

20. The Authority of the Justices of *Trailbaston* was by Act of Parliament, and by the general Rule of Law; if they erred in Judgment, a Writ of Error lay in *B. R.* to reverse their Judgment. 2 *Inst.* 540. and *vid.* 4 *Inst.* 186.

21. If an erroneous Judgment be given in *Durham*, in the Chancery, upon Proceedings according to the Common Law, or before the Justices of the

Biſhop, a Writ of Error lies before the Biſhop himſelf, and if he gives an erroneous Judgment, Error lies in *B. R.* 4 *Inſt.* 218.

22. If the Juſtice in *Eyre* gives an erroneous Judgment at a Juſtice-Seat in a Foreſt a Writ of Error lies thereupon in *B. R.* 4 *Inſt.* 297.

(f) Raym. 174. S. P. cited. 23. (f) Upon a Judgment in *Calais*, a Writ of Error lay in *B. R.* 4 *Inſt.* 282.
Vaugh. 290. 402. S. P. cited. but yet vide Kelw. 202. S. P. con.

(g) Writs of Error upon Judgments were there ſeldom brought. 24. Before the Statute of 31 E. 3. (g) Errors in the Exchequer were ſometimes examined in (h) Parliament, and ſometimes before Commiſſioners, by Force of the King's Writ under the great Seal. 4 *Inſt.* 72. 105. *Moor* 566.
Sav. 31. (h) 1 Rol. Rep. 14, 15.

(i) That the King may have Error here. Vide 1 Rep. 42. a. 3 Rep. 1. (k) By 31 El. c. 1. The not coming of the Lord Chancellor or Lord Treaſurer, or either of them at any Day of Adjournment, ſhall be no Diſcontinuance, ſo as one of them, or both Chief Juſtices come and are preſent.—But this Statute not providing Remedy where they came not at the Return of the Writ of Error. Vide 2 Leon. 59. It was enacted by 16 Car. 2. cap. 2. That if the Chief Juſtices or either of them, or the Chancellor or Treaſurer ſhall come at the Return of the Writ of Error, it ſhall be no Abatement or Diſcontinuance, but no Judgment ſhall be given unleſs both Chancellor and Treaſurer ſhall be preſent. (l) Intended of the Treaſurer of England, and at the Time of the making of this Statute, the Offices of Treaſurer of England, and of the Exchequer, were in ſeveral Hands. (m) Tho' the Barons only are Judges, yet the Treaſurer, together with them, hath the Cuſtody of the Records; and therefore the Writ of Error is to be directed to him and the Barons, and ſo 'tis tho' the Lord Treaſurer and Treaſurer of the Exchequer are the ſame Perſon. 4 Inſt. 105. Sav. 35, 36, 39.
25. By 31 *Ed.* 3. *cap.* 12. In all Caſes touching the (i) King or other Perſon, upon Complaint of Error in Proceſs in the Exchequer, the (k) Chancellor and (l) Treaſurer ſhall (m) cauſe the Record to be brought before them, and taking to them the Judges and other Sage Perſons, ſhall call before them the Barons to hear the Cauſe of their Judgment; and if upon Examination Error be found, ſhall amend the Rolls and ſend them into the Exchequer to have Execution.

(n) In Ejectment, Griffith's Caſe. Moor 248. pl. 391. 26. By 34 & 35 *H.* 8. *cap.* 26. *Par.* 113. Errors in Judgments in Pleas real and (n) mixt before the Juſtices in their great Seſſions in *Wales*, ſhall be redreſſed by Error in *B. R.* in *England*, but Errors in Pleas perſonal ſhall be reformed by Bill before the (o) Preſident and Counſel.
adjudged. Cro. El. 104. adjudged. (o) This Court is diſſolved by the Statute of 1 Will. & Mar. cap. 27. and by the ſame Act Errors in Pleas perſonal, are to be redreſſed as Errors in Pleas real and mixt were by 34, & 35 H. 8.

(p) Therefore this Act extends only to ſuch Caſes in which there was no Remedy but in Parliament, and not to Errors in Fact, for theſe might before have been examined in B. R. 2 Lev. 38. adjudged, 1 Vent. 207, 208. adjudged. Cro. Jac. 5. ſo adjudged in B. R. contrary to the Opinion of the Judges in the Exchequer-Chamber.—but that Errors in Fact may be aſſigned in the Exchequer-Chamber, and if denied, tried by Niſi prius, and how vid. Cro. El. 731. Hob. 5. Cro. Car. 514. 1 Jon. 410, 411. (q) Where an interlocutory Judgment was given before the Act, and a Writ of Inquiry after executed, &c. 1 And. 145. (r) Not Replevin. 2 Rol. Rep. 434. agreed per Curiam. (s) Extends to their Heirs, Executors or Adminiſtrators. Cro. El. 294, 295. 6. Co. 80. a. (t) Error lies not upon a Judgment in a Sci. Fa. againſt Bail. Yelv. 157. Cro. Jac. 171. Lancaſter and Keyleigh. Cro. Car. 300. adjudged. 1 Jon. 325. adjudged.—Yet Cro. El. 730. it was adjudged contrary by all the Judges and Barons except 2. for that it was within the Intent of the Statute and in Nature of an Action of Debt.—That Error lies upon a Judgment in a Sci. fa. againſt Executors upon a Judgment in Debt within the Equity of the Statute. Cro. Car. 286. per Curiam. dubitatur.— The Scire facias is but to have Execution of the former Judgment. Cro. Car. 464.—'tis in Effect a Piece of the Action. 1 Mod. 79. per Hale,—but vid. Cro. Jac. 384. Cro. Car. 143. Hob. 72. 1 Mod. 297. (u) Not in Reſcous becauſe more than Treſpaſs, and Treſpaſs would not have lay, becauſe the Cattle reſcued were the Cattle of the Defendant himſelf, and there is a Writ of Reſcous in the Regiſter diſtinct from Treſpaſs. Ody and Yates, Moor 694. pl. 963. by all the Juſtices held clearly. Cro. Jac. 171. cited.—Not in Raviſhment of Ward. 1 Rol. Rep. 134. per Croke. (x) It lies not upon any Judgment affirmed upon Error brought in B. R. 2 Bulſt. 162.— Nor upon a Judgment in a Sci. fa. upon ſuch Judgment affirmed in B. R. 1 Rol. Rep. 264.—Nor upon a Suit by Original. 1 Sand. 346.
27. By 27 *Eliz.* *cap.* 8. reciting, that erroneous Judgments in *B. R.* were (p) only to be reformed in Parliament, it was enacted, That where Judgment ſhould (q) thereafter be given in *B. R.* in (r) (s) Debt, (t) Detinue, Covenant, Account, Caſe, Ejectment, or (u) Treſpaſs, (x) firſt commen-

ced there ((y) other than ſuch where the Queen ſhall be Party) the (z) Plaintiff or Defendant againſt whom ſuch Judgment ſhall be given, may at his Election ſue out a Writ of Error directed to the Chief Juſtice, commanding him to cauſe the Record, and all Things concerning the ſaid Judgment to be brought before the Judges of the Common Pleas and Barons of Exchequer; which being of the Degree of the Coif, or 6 of them ſhall examine the Errors aſſigned or found, and thereupon reverſe or affirm the Judgment, other than for Errors concerning the Juriſdiction of the Court of King's Bench, or for want of (a) Form in any Writ, &c. or Proceeding, and (b) after the ſame (c) ſhall be brought back in *B. R.* that (d) further Proceedings may be had thereupon as well for Execution as otherways.

(y) It lies in Debt upon the Statute of Tithes. 1 Sid. 240. ſaid to have been adjudged.——but whether it lies in Debt upon the Statute of Uſury. 1 Sid. 240. dubitatur and vid. 1 Vent. 49.—It lies in Debt qui tam upon the Statute for abſenting from Church, for the King is not properly Party tho' to have Part of the Penalty. Raym. 275. adjudged. (z) Not in an Action of Scandalum Magnatum, Lord Say and Seal and Stephens. 1 Jon. 194. adjudged by 3 Judges againſt one. Ley 82. adjudged Cro. Car. 142. Earl of Stamford and Needham. 1 Sid. 143. 1 Vent. 49. (a) 1 Sid. 253. (b) So if the Plaintiff in Error be nonſuit, or the Suit be diſcontinued. 1 And. 144. 2 And. 123. (c) So that no Execution can be granted out of the Exchequer-Chamber. Stil. 238. (d) where after Reverſal and Judgment quod recuperet, and the Record remanded, a Writ of Inquiry may be awarded, &c. Faldoe and Ridye. Cro. Jac. 206. Noy 129. Yelv. 74.

28. And by the ſaid Act it is further enacted, That ſuch Reverſal or Affirmation ſhall not be Final, but the Party grieved may bring Error in Parliament.

(I) In the ſame (a) Court where the Judgment was.

Fol. 746.

(a) Where by reaſon of Fraud, &c. a Judgment may be vacated after the Term in which entred. Vide 2 Rol. Abr. 724. pl. 1. (b) It does not appear till the Error is aſſigned, whether it be for an Error in Fact or Law. 1 Sid. 208. (c) Fitz. Error 16. S. C. Br. Error 68. S. C.

1. A Writ of Error does not lie in Banco Regis (b) for an Error in a Judgment given in the ſame Court (c) 7 H. 6. 29. agreed.

2. But if the Error be not in the Judgment but in the Proceſs, there the Writ of Error lies in the ſame Court de Banco Regis where the Judgment was, and they may reverſe it. 7 H. 6. 30.

3. As they may reverſe their own Judgment for falſe Latin, becauſe this is not the Default of the Court but the Clerks. 7 H. 6. 30.

4. So upon a Judgment in a real Action, if they award an habere facias ſeiſinam of two Meſſuages and Lands in one Town, where the Demand is in two Towns, this erroneous Execution may be there reverſed upon a Writ of Error brought in another Term than that in which the Execution is awarded. H. 38 El. B. R. between Hanmet and Thomas adjudged.

5. If a Man comes in B. R. the ſame Term the Exigent is returned, and notwithſtanding this the Court gives Judgment againſt him, this may be reverſed by Writ of Error in the ſame Court, becauſe this is not the Act of the Court, but of the Sheriff or Coroner. 7 H. 6. 28. b.

6. If the Court de B. R. awards an Exigent where they ought to award a Pluries Capias, and thereupon the Party is outlawed in the Country, this may be reverſed in the ſame Court, becauſe it is the Judgment of the Coroner. (d) 7 H. 6. 28. b.

(d) Br. Error 68. S. C.

7. It

7. If a Diſtringas & octo tales be returnable in B. R. where the Award is made de octo tal' and after Judgment is given, this may be reverſed by Writ of Error in the ſame Court, becauſe the Error is in the Proceſs, and made by the Sheriff. (e) 7 H. 6. 28.

(e) Fitz. Error 16. S. C. Br. Error 68. S. C.

8. If a Partition be made in Chancery this may be reverſed by Writ of Error in the ſame Court, without going to Parliament. (f) 42. Aſſ. 22. adjudged.

(f) Br. Error 131. S. C.

9. If after a Judgment a Capias ad Satisfaciendum be awarded in B. R. where no Capias lies in the Original, and thereupon the party is outlawed, he may have a Writ of Error in another Term and reverſe it in the ſame Court, for the Error in Proceſs in promulgatione utlegariæ, becauſe this was the Judgment of the Coroners, and not of the Court. Dyer 3 El. 195. 37. adjudged.

10. If in an Action upon the Caſe in B. R. an Award is made upon non ſum informatus quod querens damna recuperare debeat, ſed quia neſcitur quæ damna, &c. a Writ of Inquiry of Damages is awarded but it is never returned, nor any final Judgment given, and yet afterwards a Writ of Capias ad ſatisfaciendum is awarded for the 8 l. Damages; and upon this an Exigent, and the Party is outlawed, no Writ of Error lies in Banco Regis in another Term for this Error in the Judgment, becauſe they cannot correct their own Error, but the Party hath his Remedy in Parliament only. Dyer 3 El. 195. 37. adjudged.

11. If a Man brings a Writ of Error in B. R. upon a Recovery in an Aſſiſe of Darrein Preſentment in Banco, and is nonſuited therein, upon which a Writ to the Biſhop is awarded for the Recoveror, yet afterwards the Recoveree may have a new Writ of Error in the ſame Court, though they ought to reverſe by Conſequence their own Award of the Writ to the Biſhop if they reverſe the firſt Judgment. (f) 23 Aſſ. 8. adjudged.

(f) Br. Error 121. S. C.

12. If Judgment be given in an Action in Banco Regis, and there alſo Execution is awarded, a Writ of Error quod coram vobis reſidet does not lie in B. R. in adjudicatione executionis becauſe they cannot reverſe their (*) own Error. M. 12 Jac. B. R. between (g) Cheſton Plaintiff againſt Bunn and Serle adjudged.

(*) Fol. 747.

(g) 1 Rol. Rep. 65. S. C. adjudged.

13. If the Defendant in an Action, being an Infant, appears in B. R. by Attorney, and Judgment is there given againſt him, a Writ of Error to reverſe this Judgment lies in the ſame Court for (h) this Error. M 25, 26 El. Rot. 98. B. R. adjudged between (i) Saer and Gurny. Mich. 5 Ja. B. R. between Watkin and Griffin adjudged. Rot. 386. Tr. 1650. between (k) Dawkes and Peyton adjudged, and the Judgment reverſed accordingly between Dawkes and Peyton, where the Caſe was, That Peyton being a Clerk of the Petit Bag of Chancery, declared there by Force of his Privilege, but not by Attorney or Guardian, and yet was within Age, and after he came of full Age, and after they pleaded to Iſſue, and after it was tranſmitted in B. R. and there was a Verdict and Judgment given for the Plaintiff, the Action being a Treſpaſs of Battery, and ſo the Caſe was more ſtrong than the other Caſes, becauſe the Error in this Caſe was committed in Chancery before the Record came in B. R.

(h) Being an Error in Fact, and vid. Cro. Jac. 5. 2 Lev. 38. antea H. the Comment upon the Statute of 27 El. cap. 8.

(i) Cro. El. 106. S. C. cited.

(k) Stil. 216. 218. S. C. adjudged.

14. (l) If 2 bring a Writ of Error in B. R. upon a Judgment in an Aſſiſe, and pending the Writ one of the Plaintiffs dies, and after the Court not knowing of the Death of one of them reverſes the Judgment, and after he againſt whom the Judgment was reverſed, brings a Writ of Error in the ſame Court de B. R. and aſſigned the Death of one of the Plaintiffs in the firſt Writ of Error, which was the Act of God, not the Error of the Court; it ſeems the Writ well lies. Vid. 2 R. 3. 1. a. b. and 20. where this is reported uncertainly, but Vaviſor in the End ſaid, that he would ſhew them Precedents.

(l) Meggot and Brough-ton like Point. Cro. Eliz. 105. adjudged. 4 Leon. 60. adjornatur.

15. If upon a Judgment in *B. R.* there be Error in the Proceſs, or thro' the Default of the Clerks, it ſhall be reverſed in the ſame Court by Writ of Error ſued there before the ſame Juſtices, (a) but not without a Writ of Error tho' it be in the ſame Term. *F. N. B.* 21. J.

(a) In ſuch Caſes where Error lies in the ſame Court, as upon an Outlawry, but if no Error lies in this Court, but in Parliament, then the King's Bench may in the ſame Term reverſe their own Judgment without Writ of Error. Poph. 181. Vide Antea c. 1, 2. &c. and vide Moor 186. pl. 332. Yelv. 157.—during the Term in which any judicial Act is done, the Record remains in the Breaſt of the Judges of the Court, and therefore the Roll is alterable during the Term as they ſhall direct; but when the Term is paſt, the Roll is the Record, and admits of no Alteration. Co. Lit. 260. a.

16. But in the Common Pleas after Judgment given, the Juſtices in the ſame Term may reverſe their own Judgment upon Error in the Proceſs or Default of the Clerks, without ſuing any Writ of Error; but in another Term the Party muſt ſue a Writ of Error returnable in *B. R. F. N. B.* 21. J.

17. If one is indicted of Treaſon or Felony in *B. R.* or being indicted elſewhere, the Indictment is removed in *B. R.* and by Proceſs of that Court he is erroneouſly outlawed, and ſo returned, a Writ of Error may be brought in *B. R.* for the Reverſal thereof. 3 *Inſt.* 214.

18. If an erroneous Judgment in Point of Law be given in *B. R.* upon an Indictment in *London*, a Writ of Error may be brought in the ſame Court, for though in Civil Caſes Error does not lie in the ſame Court, unleſs for a Matter of Fact, yet in Criminal Caſes it lies as well for an Error in Law as Fact. *Mich.* 16 *Car.* 2. (b) *Cornhill's* Caſe. 1 *Lev.* 149. adjudged and ſaid, tho' it may be brought in Parliament, that does not prove but it may be brought here alſo.

(b) 1 Sid. 208. S. C. adjudged.

(K) What (c) Perſons ſhall have a Writ of Error.

(c) If an erroneous Judgment be given againſt the Parſon, the Patron cannot have a Writ of Error. Godb. 377.——Where in Ejectment Error may be brought either by Leſſor or Leſſee. 1 Sid. 317. (d) Error and Attaint always deſcend to ſuch Perſon to whom the Land ſhould deſcend if no ſuch Recovery or falſe Oath had been. 1 Leon. 261. per Curiam. (e) This is miſprinted, and ſhould be 90. pl. 5.

1. THE Writ of Error ſhall be brought by him (d) who ſhould have the Thing for which the Judgment is erroneouſly given, if the Judgment had not been given. Dyer 1 Ma. (e) 9. 5.

2. (f) As the (g) Iſſue Female ſhall have it if intailed to her. 3 H. 4. Dyer 1 Ma. (h) 9. 5.

(f) 1 Leon. 261. S. P. per Cur'.

(g) So the youngeſt Son, when intitled to the Land by the Cuſtom of Borough Engliſh. Godb. 3. per Swanwood. —For the Action deſcends according as the Land would. 1 Leon. 261. per Curiam. Ow. 68. per tot' Cur'. 4 Leon. 5. adjudged, and vid. Bridg. 79. 1 Rol. Rep. 311.——So if a Man has Lands on the Part of his Mother, and loſeth by erroneous Judgment and dies, the Heir of the Part of the Mother ſhall have the Writ of Error. 1 Leon. 261. 2 Sid. 56. but vid. Ow. 68. Godb. 377. (h) This is miſprinted, and ſhould be 90. pl. 5.

3. None ſhall have a Writ of Error unleſs he be Party or (i) privy to the Judgment. 22 E. 4. 31.

(i) Vid. Stil. 190. Godb. 378.

4. But all that were Parties to the Fine, tho' they ſhall have nothing if reverſed, yet (k) ſhall join with him that ſhall have the Thing for Conformity. Dyer 1 Ma. 89. 2.

(k) But if Tenant for Life, and he in Remainder in Fee (being an Infant) join in a Fine, the Infant alone may bring Error; for the Error is in reſpect of the Perſon of the Infant, which is the Cauſe of the Action for him and for no other, Piggot and Harrington. 1 Leon. 317. adjudged. Cro. El. 115, 124. adjudged, and the Fine reverſed quoad the Infant only.——If 2 Infants levy a Fine, and after join in a Writ of Error to reverſe it, they muſt aſſign Errors ſeverally. 1 Leon. 317. ſaid, and that they may ſue ſeveral Writs.

5. A Writ of Error may be brought by him that is made Party by the Law, tho' he was not originally Party, as every of the Vouchees shall have a Writ of Error. (a) 22 E. 4. 31. (b) 8 H. 4. 3. b.

(a) Br. Error 187. S. C.
(b) Br. Error 39. S. C. Fitz. 61. S. C. Vid. 1 Rol. Abr. 755. pl. 1.

6. The Tenant shall have a Writ of Error also of an Error between him and the Demandant. (c) 8 H. 4. 3. b.

(c) Br. Error 39. S. C. Fitz. 61. S. C.

7. But the Tenant shall not have a Writ of Error of an Error between the (d) Demandant and the Vouchee. 22 E. 4. 32. contra (e) 8 H. 4. 5.

(d) But the Vouchee or Tenant by Receipt may of an Error between the Demandant and Tenant. F. N. B. 21. c. but vid. 1 Rol. Abr. 755. pl. 2. (e) Fitz. Error 61. S. C.

8. The Tenant shall have a Writ of Error of an erroneous Judgment given (f) against the Tenant by Receit (g) 22 E. 4. 32.

(f) The Judgment is always given against the Tenant to the Action. per Cro. Car. 263. yet vid. Br. Error 187. (g) Br. Error 187. S. C.

9. But upon Default of the Tenant, if the Demandant says that the Reversion is to J. and prays that he be received, there the Tenant shall not have a Writ of Error. Quære 22 E. 4. 32.

10. If a Judgment be given against B. and the Money of C. attached by Force of a Foreign Attachment in London, C. shall not have a Writ of Error, because he comes in by Garnishment by the Custom, and is not Party nor Privy. (h) 22 E. 4. 31.

(h) Br. Error 187. S. C.

11. If he in the Remainder be made privy to the Record by Aid praier, (*) he shall have a Writ of Error during the Life of the Lessee. Co. 3. Marquess of Winchester. 4.

(*) Fol. 748.

12. So if he be received, he shall have a Writ of Error. Co. 3. Marquess of Winchester's Case. 4. (i) 8 H. 4. 5.

(i) Br. Error 39. S. C. Fitz. 61. S. C.

13. So if he in the Reversion or Remainder be made privy by Voucher. Co. 3, 4.

14. So if a Recovery be against Lessee for Life, he in the Reversion shall have a Writ of Error (k) after his Death. 18 E. 3. 25. b. 17 Ass. 24.

(k) But if not made Party to the Record by Voucher, &c. he had no Remedy by the Common Law till after the Death of the Lessee. 3 Co. 4. a. Dyer 1. pl. 5.

15. So if the Feme be received by the Default of the Baron, and loses the Land by Judgment, the Baron and Feme shall have a Writ of Error thereupon. 49 E. 3. 21. b.

16. (l) If the Baron and Feme levies a Fine, they may by Error reverse the Fine for Nonage of the Feme, during the Life of the Baron. Co. 2. Beckwith 57. b. (m) Worsly 77. b. contra (n) 50 E. 3. 6.

(l) F. N. B. 21. D. S. P.
(m) Cro. El. 129. S. C. adjudged.
1 Leon. 114, 115. S. C. adjudged. (n) Fitz. Error 67. S. C. Br. 28. S. C.

17. If the Conusor of a Statute aliens the Land, and Execution is sued against the Alienee, he may have a Writ of Error upon the Execution. (o) 18 E. 3. 25. b. adjudged. Quære, for he is not privy

(o) Fitz. Error 71. S. C.
1 Rol. Abr. 751. pl. 12. S. C. Dyer 1. pl. 5.

thereto, for the Execution goes of the Land of the Conuſor. Dyer 4 H. 8. 1. 5. (a) 17 Aſſ. 24. the ſame Caſe, becauſe he is ouſted by the Execution.

(a) Fitz. Error 114. S. C. Godb. 377.

S. C. cited, and ſaid, that otherways there would be no Remedy; for the Conuſor himſelf could not have Error, becauſe the Lands were not extended in his Hands. Godb. 379.

18. (b) If an Action be brought againſt A. as a Feme ſole, where ſhe is a Feme covert, and (c) ſhe pleads to Iſſue as a Feme ſole, and after a Judgment is given againſt her, and ſhe is took in Execution, ſhe and her Husband may bring a Writ of Error; for otherways the Husband ſhall be prejudiced in the Conſortſhip of his Wife, and of her Care concerning his Buſineſs and Family, and he hath not other Means to help himſelf; but in the Caſe of a Fine the Husband may enter and avoid it. Tr. 1651. between (d) Hayward and Williams adjudged in a Writ of Error. Intratur Hill. 1649. Rot. 824. (e) 18 E 4. 4. per Curiam. M. 15 Car. B. R. per Curiam, between (f) Edwards and Simpſon, in a Writ of Error upon a Judgment in the Marſhalſea.

(b) 2 Rol. Rep. 53. S. P. per Cur', but becauſe in the Aſſignment of Error it did not appear that ſhe was married, when the Original was ſued out, the Judgment was affirmed. (c) So if (d) Stil. 254, 280. S. C. adjudged (tho' it was objected that the Husband was a Stranger to the Record) for he had no other Remedy, to prevent the Loſs of the Society of his Wife, being taken in Execution. 1 Rol. Abr. 759. pl. 10. S. C. which vide poſt. (e) Br. Error 173. S. C. Br. Joinder in Action 88. S. C. my firſt Part, 708. pl. 4. S. C. (f) 1 Rol. Abr. 759. pl. 10. S. C. which vide poſt.

19. (g) So in the ſaid Caſe if the Action be brought againſt A. and others, they all with the Husband may join in a Writ of Error, in the ſaid Caſe of Hayward and Williams adjudged per Curiam, and the Judgment reverſed accordingly.

(g) Stil. 254, 280. S. C. but S. P. does not appear.

20. (h) If pending a real Action the Tenant aliens in Fee, and after a Recovery is had againſt him, he himſelf may have a Writ of Error, tho' he hath nothing in the Land, becauſe he is privy to the Judgment after his Alienation and Tenant in Law.

(h) 1 Rol. Abr. 788. pl. 8. S. P. 1 Co. 111. b. 112. a. S. P. Cro. Eliz. 294, 295. S. P. per Curiam, Palm. 254. S. P. per Dod' 247. and when he is reſtored the Alienee ſhall enter upon him.

21. (i) So if he had alienED in Fee, pending the Writ, and repurchaſed it for Life, and after Judgment had paſſed againſt him, he ſhould have had a Writ of Error.

(i) 1 Rol. Abr. 788. pl. 6. S. P.

22. So his Heir after his Death ſhall have a Writ of Error, tho' he ſhall have nothing in the Land, for the Privity which he hath to the Judgment, contra 50 Aſſ. 3.

23. If the Tenant aliens, pending the (k) Writ, and after Judgment paſſes againſt him, the Alienee cannot have a Writ of Error upon this Judgment for want of Privity. 21 Aſſ. 2.

(k) This Word Writ is wanting in the Original.

24. So if the Tenant aliens, pending the Writ, and repurchaſes it for Life, and after Judgment paſſes againſt him, and after he dies, it ſeems he in Reverſion ſhall have a Writ; for tho' he had nothing in the Land at the Time of the Writ purchaſed, yet he had a Reverſion at the Time of the Judgment, and ſo privy thereto, dubitatur (l) 50 Aſſ. 3.

(l) Br. Error 132. S. C.

25. In an Action againſt J. S. if certain Perſons become Bail for him, and after Judgment is given againſt J. S. the Bail cannot have a Writ of Error upon the firſt Judgment, (m) if Judgment be not alſo given againſt the Bail in a Scire facias. H. 11 Ja. B. R. per Curiam. Hill. 11 Car. B. R. between Hardy and Brown, per Curiam, adjudged in a Writ of Error upon a Judgment in Rippon. Intratur T. R. 10 Car. Rot. 979. But the Judgment upon the Scire facias (*) reverſed upon this Writ for Error in the Judgment upon the Scire facias.

(m) That they cannot after ſuch Judgment given. Vide Stil. 471.

(*) Fol. 749.

facias. But Mich. 13 Car. B. R. between (a) South and Griffith, such Writ brought by the Bail upon the first Judgment against the Principal, and upon a Judgment in a Scire facias against the Bail, was (b) abated, and he put to a new Writ. Intratur Hill. 12 Car. Rot. 559. Mich. 15 Car. B. R. between Williams and Worral, such Writ abated, being brought upon such Judgments in the Marshalsea. Intratur Tr. 15 Car. Rot. 1200. Mich. 24 Car. B. R. between Jeffrys and Scot, adjudged the Writ shall abate. Intratur M. 23 Car. Rot. 218.

(a) Cro. Car. 481. S. C. and S. P. by 2 Judges against 1, but if it had recited the first Judgment, (as of Necessity he must make Mention thereof) and the Judgment in the Scire facias, and alledged the Error in the 2d. Judgment it had been well enough. 1 Jon. 396. S. C. adjudged. (b) Of late it hath been ruled that such Writ ought to abate for the Whole. Stile 174. per Curiam.

26. In a Writ of Annuity against an Heir, upon an Annuity granted by his Ancestor in Fee, upon non est factum pleaded, if a Verdict be found for the Plaintiff, and thereupon Judgment is given that the Plaintiff shall recover his Costs, Damages and Arrears of the Lands descended from the same Ancestor; and thereupon a Writ of Execution is awarded to levy it of the Lands descended, but no Return thereof appears upon the Record; and after the Heir dies intestate, his Administrator cannot have a Writ of Error upon this Judgment; in as much as he loses nothing thereby, for if it be levied, it is of the Lands descended, the which nor the Profits thereof he cannot have, nor be restored to it if he reverses the Judgment. Hill. 11 Car. B. R. between Franke and Stukely, per Curiam in a Writ of Error upon a Judgment in Banco. Intratur Hill. 10 Car. Rot. 990.

27. If a Judgment be given against the (c) Principal, and after a Judgment against the Bail in a Scire facias against them, the Principal shall not have any Writ of Error upon the first Judgment and the Judgment against the Bail. Mich. 13 Car. B. R. between (d) Griffith and South. Dubitatur Hill. 15 Car. in Camera Scaccarii in a Writ of Error between Coke and upon a Judgment in Banco Regis such Writ of Error was abated per Curiam.

(c) The Principal cannot have Error on the Judgment against the Bail. 2 Leon. 4 Cro. Car. 408. — Nor Bail on Judgment against the Principal. Cro. Car. 408. Stil. 39. 1 Levr 137. (d) Cro. Car. 481. S. C. but S. P. does not appear.

28. If there be Tenant in Tail, the Remainder in Fee, and in a Præcipe brought (e) against Tenant in Tail an erroneous Judgment is given against Tenant in Tail, and he after dies without Issue, he in Remainder may have a Writ of Error, for when the Statute *de donis* gave Liberty to limit a Remainder after an Estate-Tail, the Law gave such Actions to him in Remainder, as belonged to Privies in Estate. 3 *Co.* in the Marquess of *Winchester*'s Case, 3. b. agreed.

(e) So if Tenant in Tail levies a Fine, and before the Proclamation passes a Precipe is brought against the Conusee, who vouches the Tenant in Tail, &c. for when the Tenant in Tail comes in as Vouchee, 'tis as of his old Estate, so that the Privity between the Tenant in Tail and him in Remainder continues. Holland & al' versus Jackson. S. P. Bridg. 69, &c. 1 Rol. Rep. 311.

29. If Tenant in Tail male hath Issue a Son and a Daughter by one *Venter*, and a Son by another, and dies, and the eldest Son makes a Feoffment, and a common Recovery is had against the Feoffee in which the eldest is vouched, and he vouches over the Common Vouchee, and after the Eldest dies, the youngest Son may have a Writ of Error; for tho' the Eldest should have rendered a Fee-simple to the Feoffee according to his Loss, yet he should have recovered but an Estate-Tail, *viz.* such an Estate as he had when the Warranty was made, which would have descended to the Youngest, and consequently the Writ of Error shall be brought by him.

(f) Owen 68. S. C. adjudged. Godb. 377. S. C. cited. 18 *Eliz.* between (f) *Henningham* and *Windham*. 1 *Leon.* 261. adjudged.

30. If in a Common Recovery 4 Husbands and their Wives are vouched, the Voucher ſhall be intended to have been in the Right of their Wives, and the Heir of any one of the Wives, may have a Writ of Error; for this Charge in the Realty did not ſurvive; and the Heir of every of them being chargeable, the Heir of any of them, and not of the Survivor only, may have Error. *Mich.* 26 *Eliz.* between *Gravenor* and *Maſſey*. 1 *Leon.* 291. adjudged, where Error was brought as Heir to one of the Husbands, but the Plaintiff relinquiſhed that, and brought a new Writ, and intitled himſelf as Heir to one of the Wives.

31. (a) In a *Præcipe quod reddat* if the Tenant diſclaims, he ſhall never have a Writ of Error, (b) becauſe by his Diſclaimer he has debarred himſelf of all Right in the Land. 8 *Co.* 61. b. 62. a. *Beecher's* Caſe.

(a) 3 Leon. 176. S. P. per Cur' arguend' 1 Rol. Rep. 302. S. P. arguend'.

(b) Otherways where the Tenant departs in Deſpite of the Court, or Judgment is given upon his Confeſſion. 8 Co. 62. a. F. N. B. 21. K. — So if upon his Default. Vide Salkill and Howard. 2 Rol. Rep. 127. Palm. 56, 57, &c. F. N. B. 22. C.

32. If in a *Quare impedit* Judgment be given againſt the Biſhop and Incumbent, tho' the Biſhop claimed nothing but as Ordinary, and ſo loſt nothing, yet being privy to the Record he may for Conformity join in Error, for the Plea of the Biſhop is not ſo ſtrong as a Diſclaimer. *Trin.* 29 *Eliz.* between (c) the Queen and the Biſhop of *Glouceſter*. 3 *Leon.* 176. adjudged.

(c) Biſhop of Glouceſter and Savacre. Cro. Eliz. 65. S. C. adjudged, and Wray ſaid, That the Biſhop had a Loſs, for that the Writ ſhall be to the Archbiſhop for Admiſſion and Inſtitution; ſo that the Biſhop having a Loſs may therefore join. Vid. 3 Mod. 134, 135.

33. If Execution upon a Judgment is ſued by *Elegit*, and Lands only extended, and after the Defendant dies his Adminiſtrator may have a Writ of Error, for he is privy to the Record, and may *in futuro* have Loſs by it. *Hill.* 35 *Eliz.* between (d) *Scrogs* and the Lord *Mortdant*. *Cro. Eliz.* 294. and at the End of the Caſe 'tis ſaid, *Nota*, That the Execution of the Land may be avoided, and then the Adminiſtrator may be damnified.

(d) Moor 686. pl. 949. S. C. adjudged.

34. If a Man be outlawed for Felony, and dies, his Executors may have a Writ of Error to reverſe it, for they are privy to the Judgment, and poſſibly may have all the Loſs, as if the Teſtator had only Goods. *Paſch.* 33 *Eliz.* (e) *Marſh's* Caſe. *Cro. Eliz.* 225, 273, 274. *adjornatur*, and the Objection that the Teſtator was attainted, and ſo had no Goods nor could make an Executor, was held (f) not material in this Suit, which is to reverſe the Outlawry, by which the Diſability ariſes.

(e) Ow. 147. S. C. debated. 1 Leon. 325. adjudged, and the Outlawry reverſed accordingly, and by all the Books it ſeems to be admitted, that the Heir alſo might have had a Writ of Error in reſpect of the Prejudice to him. 5 Co. 111. a. S. C. cited to have been adjudged. Cro. El. 558. S. C. cited to have been adjudged by 3 Judges againſt 1. Vid. 1 Rol. Abr. 912. pl. 3.

(f) Godb. 379.

35. If a Woman recovers her Dower and Damages, and the Tenant brings a Writ of Error, pending which the Woman dies, (g) he may have a Writ of Error againſt her Executor to avoid the Judgment as to the Damages, for that is a Grievance to him as well as the Loſs of the Land. *Paſch.* 39 *Eliz.* in *Williams's* Caſe. *Cro. Eliz.* 558. by *Popham* and *Gaudy*.

(g) Viz. quod coram vobis reſidet. Noy 126.

36. If in a real Action the Land and Damages are recovered, and the Tenant dies, and his Heir, who in reſpect of the Land ought to have a Writ of Error, releaſes all Writs of Error, yet the Executor of the Tenant may bring a Writ of Error to avoid the Judgment as to the Damages, for he that hath a Loſs muſt have a Remedy to redreſs it. *Paſch.* 39 *Eliz.* in *Williams's* Caſe. *Cro. Eliz.* 558. by *Popham* and *Gawdy*.

37. *A.* being ſeiſed in Fee, *B.* his eldeſt Son is outlawed for Felony, *A.* dies, and *B.* enters and deviſes to *C* and dies, and *C.* enfeoffs *D.* and whether *D.* could have a Writ of Error to reverſe this Outlawry. *Paſch.* 3 *Car. Brookes's* Caſe, *Godb.* 376. Debated, *& adjornatur*.

(a) Bushell and Yaller. S. P. Cro. Car. 408. adjudged. 1 Jon. 360. adjudged, Forest and Sir James Sandland. S. P. Hob. 72. adjudged. Cro. Jac. 384. adjudged. 1 Rol. Rep. 294. adjudged. Cro. Car. 574. S. P. adjudged. 561. S. P. adjudged. and vide 1 Bulst. 125. Lit. Rep. 93. 1 Lev. 137. (b) But vide 1 Lev. 142. where it is made a Question, Whether the Vouchee alone, without the Tenant, may have Error to reverse a Common Recovery, because the principal Judgment is to be reversed, and the Judgment against the Vouchee but as a Consequent thereof. (c) 1 Jon. 325. S. C. adjudged per totam Curiam. Godb. 440. S. C. adjudged.

38. (a) If Judgment be given against the Principal, and after upon a *Scire facias* against the Bail, Judgment be also given against them, these Judgments are several, and they shall not join in a Writ of Error no more than Tenant for Life, and he in Reversion, or the Tenant and Vouchee (b) may join. *Pasch.* 9 *Car.* between (c) *Lancaster* and *Keyleigh*. *Cro. Car.* 300. adjudged *per totam Curiam.*

(d) So the Feoffee of him against whom a Judgment is given, shall not have a Writ of Error before the Lands are taken in Execution, but after he may.

39. If *J. S.* binds himself and his Heirs in a Bond, and thereupon Judgment is obtained against *J. S.* and *J. S.* makes his Will, and his Heir at Law Executor, and dies, leaving Lands which descend to his Heir, yet he shall not have a Writ of Error as Heir, for he is not privy to the Judgment, and when an Extent is made upon him, it is as (d) Tertenant, but after the Lands are taken in Execution he may have a Writ of Error. *Trin.* 23 *Car.* between *White* and *Thomas*. *Stil.* 38, 39. *per Roll*; *sed adjornatur.*

(e) 3 Mod. 134. S. P. adjudged upon a Judgment in Debt, where the Writ of Error was brought by him that was of full Age alone. (f) Stil. 400.

40. (e) If there be 3 Defendants, and they all appear by Attorney, whereas one of them is an Infant, and Judgment is given against all, they must all join in a Writ of Error, for the Judgment is intire, and (f) cannot be naught as to the Infant, and good as to the rest. *Hill.* 1654. *Stil.* 406. *per Roll.*

(g) Stil. 190. S. P. per Rol. con. but vid. Hob. 70.

41. (g) If in Trespass against three, as to one, there is Judgment against the Plaintiff, and as to the other two, for the Plaintiff; the Two only without the Third may have a Writ of Error, for he for whom the Judgment was given cannot say that the Judgment was to his Damage. *Pasch.* 19 *Car.* 2. between *Cannon* and *Abbot*. 1 *Lev.* 210. *per Curiam, præter Twisden*, who held that the Writ ought to be brought by all.

(L) Against whom it lies.

(h) His Executors or Administrators. F. N. B. 107. K. (i) Br. Error 9. S. C.

1. **It does not lie against any but against him** (h) **who is Party or Privy to the first Judgment.** (i) 9 H. 6. 46. b. Curia.

(k) Br. Error 9. S. C.

2. **It does not lie against any who is not Party or Privy, tho' he be Tenant of the Land.** (k) 9 H. 6. 46. b. Curia.

(l) And that the Judgment may be reversed against them, but a Scire facias must go against the Tertenants, &c. 1 Rol. Rep. 302. S. P. per Bridg. arguendo. (m) Br. Error 9. S. C.

3. **The Writ lies against him who is Party or Privy to the Judgment,** (l) **though he hath nothing in the Land.** (m) 9 H. 6. 46. b. Curia.

(n) Br. Error 9. S. C.

4. **If a Man recovers and dies without Heir,** Quære, **Against whom the Writ of Error shall be brought.** (n) 9 H. 6. 49. b. Quære.

(M) At what (e) Time (a) it may be brought.

(e) By the Statute of 10 & 11 Will. c. 14. a Writ of Error upon a Fine, Recovery or other Judgment, muſt be brought within 20 Years, after ſuch Fine levied, Recovery ſuffered, or Judgment ſigned or entered.

1. (b) A Writ of Error bearing Date (c) before the Judgment given is not good, for it lies not before the Judgment given, for the Writ is, ſi Judicium redditum ſit, &c. (d) 22 H. 6. 7. contra 1 R. 3. 4.

(a) Not to reverſe an Outlawry till it be returned of Record. Co. Lit. 288. b. (b) Moor 461. Pl. 647. S. P. (c) A Writ of Error that bears Teſte before the Judgment is good, and this is the uſual Courſe for preventing and ſuperſeding Execution. March 140. per Curiam.— 1 Vent. 255. S. P. per Hal. ſo Judgment be given before the Return of it, and vid. 3 Keb. 308. 1 Vent. 96. Lat. 133. — It may be returnable the ſame Term Judgment is given. 1 Sid. 104.—The Judgment when entred hath Relation to the Day in Bank, ſo that a Writ of Error returnable after in the ſame Term, will remove the Record. 1 Mod. 212.—— But a Writ of Error that bears Teſte before any Plaint entered, is not good; for how can the Proceſſus be removed when none is entered. March 140. per Curiam.——Where Judgment is not given, the ſpecial Matter may be returned, viz. that no Judgment was given. 1 Sid. 466. 1 Vent. 96. and vid. 1 Sid. 311.——The Defendant upon an Indictment of Barretry brought a Writ of Error, bearing Teſte before the Aſſiſes, and it was diſallowed, becauſe if ſuch Practice ſhould obtain, it would diſappoint all Proceedings there. 1 Vent. 255. 3 Keb. 308.——But when a Certiorari is awarded before any Indictment found, but one is found before the Return, it ſhall be removed. Vide my firſt Part, Fol. 791. pl. 1. (d) Br. Error 76. S. C.

2. (e) In an Aſſiſe of darrein Preſentment, if the Parties demur upon the Title, and it is adjudged for the Plaintiff, and that he ſhall have a Writ to the Biſhop, a Writ of Error lies upon this Judgment before the Damages inquired of, becauſe there were no Damages at the Common Law, and then the Writ would lie preſently, and the Addition of Damages given by the Statute to be inquired of by the Sheriff, ſhall not ſtay the Writ of Error, and if it be affirmed it may be inquired of the Damages where it is affirmed. 17 E. 3. 5. b. 19. b. 21. adjudged 33.

(e) Poſt. pl. 11. like Point.

3. If a Man recovers by Default in a Writ of Couſinage or Aiel, a Writ of Error lies upon this before the Damages are inquired of, becauſe the Damages are but an Addition to the Common Law given by the Statute, (*) and ſo the Judgment for the Principal continues as it was at Common Law. 17 E. 3. 21. 33.

(*) Fol. 750.

4. No Writ of Error lies upon a Judgment to account before the laſt Judgment, becauſe the Plea is not ended till he hath accounted. (f) 21 E. 3. 9. adjudged. Co. 11. (g) Metcalfe 38. adjudged. Vide Noy's Reports 68. two Executors have Judgment againſt B. quod computet the Writ ſhall not abate by the Death of one of the Executors.

(f) Cro. El. 636. S. C. cited. 11 Co. 47. b. S. C. cited, and vide 2 Leon. 68. 2 Bulſt. 119, 120. 3 Bulſt. 233. Cro. Jac. 224. 2 Rol. Rep. 125. Stile 290. (g) Cro. Jac. 356, 357. S. C. and S. P. dubitatur. 1 Rol. Rep. 85. S. C. adjudged. Godb. 258. S. C. adjudged.

5. No Writ of Error lies upon an (h) Award before the Original be determined. 17 E. 3. 21. b.

(h) As where the Tenant was ouſted of Aid. Cro. El. 636. Palm. 2.—11 Co. 40. a. in ſeveral Inſtances.

6. As it does not lie upon an Award of a Capias, Summons, or Reſummons before the Original determined. 17 E. 3. 21. b.

7. (i) In a Writ of Partition if the Judgment be given quod partitio fiat, and thereupon a Writ is directed to the Sheriff to make a Partition before it is executed and returned, no Writ of Error lies upon the firſt Judgment for that before the laſt Judgment, which ought to be quod partitio præd' foret firma & ſtabilis in perpetuum the Plaintiff may be nonſuit, or he may upon the Return of the Sheriff ſuggeſt to the Court that the Partition is not equal, and ſo have a new Partition, and alſo he may releaſe before the laſt Judgment.

(i) Co. Lit. 168. a. S. P.

Mich.

(a) Cro. Eliz. 635, 643. S. C. adjudged. Moor 643. pl. 888. S. C. and S. P. dubitatur. Noy 71. S. C. adjudged. 1 Rol. Rep. 85. S. C. cited. 2 Bulſt. 104. S. C. cited, and vide 2 Rol. Rep. 125.

Mich. 40, 41 El. B R. between the (a) Lord Barkly and the Counteſs of Warwick adjudged. M. 10 Ja. B. 20. between (b) Ballad and Rawlins per Curiam, P. 13 Car. B. R. between Williams and Watkins adjudged, and ſuch Writ abated, being brought upon the firſt Judgment given in Cardigan.

(b) Cro. Jac. 324. S. C. adjudged. 2 Bulſt. 104. S. C. adjudged, and vide 2 Bulſt. 119, 120.

(c) Vide Noy 54. which ſeems con.

8. A Writ of Error lies in Camera Scaccarii after an Award of the Court of King's Bench for Judgment, and the Roll ſigned for Judgment by the Clerk (c) before any Judgment entered; for otherwaps the Plaintiff in the Writ of Error ſhould be at great Prejudice, for the Uſe of the Court is not to enter the Judgment till the Vacation after, but to award Execution preſently after the Signing of the Roll for Judgment, and before Entry thereof, and ſo if the Writ of Error ſhall not be allowed after Signing and before the Entry, the Plaintiff in the Writ of Error ſhould not have any Benefit of the Superſedeas of the Execution, which is incident to the Writ of Error.

(d) 1 Rol. Abr. 898. M. 1. S. C.

Mich. 15 Jac. B. R. between (d) Smith and Bowles, by all the Clerks that this is the common Courſe, and per Curiam adjudged.

(e) 1 Brownl. 127. S. P. adjudged con. and vid. 11 Co. 40. b. 1 Rol. Abr. 760. B. 1.

9. (e) If a Woman recovers in a Writ of Dower, a Writ of Error lies before the Writ of Inquiry of Damages awarded, and before the third part aſſigned by Metes and Bounds, (f) for the Judgment is perfect as to the Realty, and the Damages given by the Statute by way of Addition. P. 17 Car. B. between (g) Steward and Steward, per Curiam adjudged, and the Inquiry of Damages after the Writ of Error brought, quaſhed.

(f) Vide the Caſe of Allewerth and Roberts, my ſecond Part, 679, 681. and Vide Stile 290. (g) March 88. S. C. adjudged.

(h) So in Debt but otherwiſe in Treſpaſs and Caſe, where the Damages are the Principal. Cro. Eliz. 235. 1 Leon. 309. and vide Cro. Eliz. 636.

10. In an Ejectione firmæ if the Plaintiff recovers per nihil dicit, in which Judgment is given that the Plaintiff ſhall recover his Term, and a Writ awarded to inquire of the Damages, a Writ of Error lies upon this Judgment before the Return of the Writ of Damages, and Judgment thereupon, (h) for the Judgment is perfect as to the Recovery of the Term before by the firſt Judgment, and the Plaintiff may preſently have Execution for the Poſſeſſion, and perhaps he will never have Judgment for the Damages, and ſo the Defendant ſhould be ouſted of the Poſſeſſion without Remedy. Tr. 3 Car. B. R. between (i) Newton and Terry. Intratur Mich. 2 Car. Rot. 110. per Curiam, in a Writ of Error Judgment reverſed, Nota, Mr. Hoddeſdon the Secondary de B. R. ſaid to me that this is now agreed by both Courts, ſcilicet, the Common Pleas and King's Bench.

1 Leon. 193. N. Dyer 291. Margine. 3 Bulſt. 233. Palm. 6. Vide the Differences taken by Dod' and vide 2 Rol. Rep. 126. Lat. 133. Stil. 109. 1 And. 145. (i) Lat. 212. S. C. adjudged Noy 95. S. C. adjudged.

(k) Antea pl. 2. like Point, (*) Fol. 751. and vide March 89.

11. (k) If a Man recovers in a Quare impedit upon a Demurrer, the Defendant may have a Writ of Error before the Writ of Inquiry of Damages (*) returned, for ſuch Writ may be awarded out of the King's Bench, if the Judgment be affirmed there. Note, This Was the Lord Arundel's Caſe againſt Edmonds, about 15 Car. admitted, and ſo is the conſtant Practiſe of the Court, for no Damages were given at the Common Law, but given by the Statute; contra Noy's Reports 66. the Biſhop of Gloceſter and Vele.

(l) Fitz. Error 71. S. C. 1 Rol. Abr. 748. pl. 17. S. C.

12. If an Execution upon a Statute-Merchant be awarded where a Stranger is ſeiſed of the Land by Feoffment of the Conuſor, yet he ſhall not have a Writ of Error of the Execution before he is ouſted by the Execution. (l) 18 E. 3. 25. b. becauſe he is not privy to the Record before this, nor before the Return of Execution, and after the

Ouſter of him by Force of the Writ by the Sheriff. Dubitatur 18 E. 3. 25. b.

13. If a Man recovers in a Præcipe quod reddat againſt me, I may have a Writ of Error before Execution is ſued. 18 E. 3. 26. 17 Aſſ. 24.

14. (a) If a Man recovers in an Ejectione firmæ, by Confeſſion nihil dicit non ſum informatus or Demurrer, a Writ of Error lies (b) before the Damages taxed by Writ of Enquiry. I had theſe Precedents of Maſter Hoddeſdon, Secondary de B. R. P. 13 El. B. R. Rot. 52. between Taverner and Fawcet, Error brought upon a Judgment in Banco, and a Writ of Inquiry awarded in B. R. the like between Bach and Errington. P. 13 El. B. R. Rot. 51. Tr. 35 El. B. R. Rot. 696. Wimark's Caſe, and ſame Caſe. Co. 5. Wimark's Caſe, 74. where Judgment upon Demurrer in B. R. and before the Return of the Writ of Enquiry Error was brought in Camera Scaccarii, and there affirmed and remanded. P. 44 El. Rot. 438. B. R. between Howſe and Layton, Error brought in Camera Scaccarii before Damages aſſeſſed, and this affirmed Mich. 25, 26 El. B. R. Error brought after Judgment and before Damages aſſeſſed, and this reverſed for Error in Fact. Tr. 3 Car. between (c) Newton and Terrye per Curiam in a Writ of Error. New Entries 191. between Dun and Lawe. But vide this is there but an Award. Hill. 1649. between Broad and Barnet adjudged in a Writ of Error upon a Judgment by nihil dicit in Banco. Intratur T. R. 1649. Rot. 1535.

(a) Cro. El. 636. S. P. arguend' Palm. 2. S. P. arguend' and vide Stile 109, 127. where ſaid if Judgment be affirmed in B. R. a Writ of Inquiry will lie there.

(b) For upon the Judgment quod recuperet terminum, the Plaintiff may have an Habere facias poſſeſſionem, and if Error would not lie on this Judgment, the Plaintiff after he had got Poſſeſſion upon an erroneous Judgment, would never execute a Writ of Inquiry, and ſo the Defendant would be without Remedy, Smith and Armin. Lat. 112, and vide Stil. 283, 346. March 88. 1 Keb. 327. (c) Lat. 212. S. C. adjudged Noy 95. S. C. adjudged.

15. But in an Ejectione firmæ, if Judgment be given ideo conſideratum eſt quod querens poſſeſſionem ſuam termini adhuc venturi de tenemento præd' recuperare debeat, no Writ of Error lies before Damages taxed, becauſe there is (d) but an Award, but otherwiſe it had been, if it had been recuperet M. 5 Ja. B. R. Rot. 269. between Lane and Alexander, per Curiam in a Writ of Error in Camera Scaccarii upon a Judgment in B. R. and the Record remanded in B. R. accordingly for the Cauſe aforeſaid.

(d) Stil. 265.

16. If a Man recovers in a Quare impedit (e) and after brings a Writ of Quare non admiſit againſt the Biſhop, a Writ of Error may be after brought upon the Judgment in the Quare impedit, and the Record ſhall be removed, tho' the other Writ of Quare non admiſit be not yet diſcuſſed. Dubitatur 26 E. 3. 75. b.

(e) That it lies before a Writ to the Biſhop awarded. Godb. 439.

17. If a Man recovers Damages, and after a Year ſues a Scire facias of the Damages, a Writ of Error lies after of the Judgment, and the Record ſhall be removed. 26 E. 3. 75. b.

18. (f) If an Infant ſuffer a Common Recovery (g) by Guardian, in which he is Tenant to the Præcipe, at full Age he may have a Writ of Error as well as within, and aſſign for Error that he was within Age at the Time of the Recovery ſuffered, for if he had brought this Writ within Age, it ſhould not have been tried by Inſpection. P. 9 Car. B. R. between the (h) Earl of Newport and the Duke of Buckingham, per Curiam reſolved, and not ſuffered to be argued at the Bar, where the Queſtion in Law was, Whether he could avoid the Recovery by Writ of (*) Error which was ſuffered by Guardians when he was within Age: And it was adjudged quod non.

(f) Yelketh and Lee, S. P. ſeems to be admitted. 1 Sid. 466. 1 Mod. 48, 49. 2 Sand. 94.

(*) Fol. 752.

(g) Otherways where he comes in as Vouchee in Perſon, and this cannot be tried by Jury, as where he appears by Attorney, Raby and Robiſon. 1 Lev. 142. ſaid to have been the Opinion of the Judges, tho' the Parties agreed. 1 Sid. 321. their Opinion ſo declared after a Conference with the other Judges, tho' the Parties had agreed; and vide 1 Sid. 447. 2 Rol. Abr. 573. pl. 7. (h) Cro. Car. 307. S. C. but S. P. does not appear. 1 Jon. 318. S. C. but S. P. does not appear. 2 Rol. Abr. 573. pl. 12. S. C.

19. If an erroneous Judgment was given againſt Tenant for Life, he in the Reverſion or Remainder, if not made Party to the Record by Voucher, &c. (a) could not by the Common Law have had Error (b) till after the particular Eſtate was determined. 3 *Co.* 4. *a.*

(a) 2 Bulſt. 15.

(b) For before that he could not be ſaid to be a Party grieved. Cro. El. 289.

20. But if he in the Reverſion or Remainder was made Party to the Record by Voucher, *&c.* he ſhould have had a Writ of Error preſently during the Life of the Tenant for Life, in regard that he was made Party to the Record. 3 *Co.* 4. a.

21. But by the 9 *R.* 2. *cap.* 3. it is provided, That if (c) Tenant for Life, in Dower, by the Curteſy, or after Poſſibility of Iſſue extinct, loſe in a *Præcipe*, (d) he in Reverſion, his Heirs or Succeſſors, ſhall have an Attaint or Error as well in the Life of ſuch Tenants as after their Death, *&c.*

(c) By this ſpecial enumeration the Intent appears, that it ſhall not extend to Reverſions upon Eſtates Tail. 3 Co. 4. b. (d) Tho' Remainders are not named, yet they are within the Purview of the Act. 3 Co. 4. a.

22. If a *Quare impedit* is brought againſt two, and one pleads to Iſſue, and the other confeſſes the Action, upon which Judgment is given, he ſhall not have a Writ of Error till the Matter is determined as to the other, for the Writ of Error muſt rehearſe all that are Parties to the Original, (e) and as to one, Judgment is not given, and if the Record ſhould be removed before the intire Matter is determined, there would be a Failure of Right. 11 *Co.* 39. a. in *Metcalf*'s Caſe, *per Curiam*, and (f) 34 *H.* 6. 41. a. cited for Proof thereof.

(e) March 89.

(f) Fitz. Error 35. S. C.

23. If in a Formedon the Tenant has Judgment for Part, no Writ of Error lies until the intire Matter in Demand is determined, for the Judgment is *ſi judicium inde redditum ſit*, which Word *inde* goes to the intire Demand. 11 *Co.* 39. b. where *Dyer* 291. b. is cited for Proof thereof.

24. If in an Action of Account Judgment is given *quod computet*, and thereupon the Defendant brings a Writ of Error, yet the Record ſhall not be removed till the intire Matter of the Account be determined, *ne Curia Domini Regis deficeret in Juſtitia exhibenda.* (g) 11 Co. 39. b.

(g) 1 Rol. Rep. 85. S. C. Tho' the Record be actually ſent, yet in Judgment of Law 'tis not removed, and the inferior Court may proceed, and vide 2 Rol. Rep. 116.

25. (h) If Debt be brought againſt divers by ſeveral *Præcipes*, and Judgment given againſt one, he may have Error before Determination of the Matter as to the others, for there being ſeveral Counts, the Record of his Count and the Pleading ſhall be ſevered from the Original and removed in *B. R.* and yet the Original ſhall remain in *B.* for otherways the Court of Common Pleas could not proceed to determine the Reſidue without the Original. 11 *Co.* 41. a. *Coke* ſays, it ſeems to him, that in this Caſe if there be Error in the Original upon a *Certiorari*, the Chief Juſtice ſhall only certify the Tenor of it.

(h) 2 Rol. Rep. 125. S. P. arguend' 126. S. P. per Haughton Juſtice, and vide Dyer 291. b. March 89.

26. If in a *Quo Warranto* Judgment be given as to Part of the Liberties claimed, that they ſhall be ſeiſed, and that the Defendants *capiantur pro fine*, and as to other Part, *Curia adviſare vult*, a Writ of Error lies before any Judgment given for the other Part. (i) *Paſch.* 17 *Car.* 2. adjudged upon a Writ of Error upon a Judgment in a *Quo Warranto* againſt the Corporation of *Dublin*. *Palm.* 1, 2, *&c.* *Vide* a long Argument and the Judgment affirmed accordingly.

(i) 2 Rol. Rep. 113. S. C. ſeems to be S. C. adjudged accordingly.

(N) (*) How (a) (b) the Writ ſhall be brought.

(*) Tho' the Writ ought to be agreeable to the Record, yet per 5 George cap. 13. if the Writ vary from the original Record, or be otherways defective, it may be made agreeable to the Record by the Court

1. (c) **If a Writ of Error be brought in this Manner**, videlicet, **this is directed to** Sir Edward Littleton, (**he being then Chief Juſtice** de Banco) **to certify a Judgment** in querela, quæ fuit coram vobis & Sociis veſtris, **where it was before Sir** John Finch, **then Chief Juſtice, the Predeceſſor of** Sir Edward Littleton; **this Writ ſhall abate.** Tr. 16 Car. B. R. **between** Lowes **and** Webbe **adjudged** per Curiam.

where made returnable. (a) It muſt always be directed to them before whom the Judgment is, per Godb. 44. —To him who hath the Cuſtody of the Record wherein any Judgment is given, as of a Judgment in the Common Pleas to the Chief Juſtice only; ſo upon a Judgment in the Exchequer to the Treaſurer of the Exchequer and Barons, to have the Record before the Chancellor and Treaſurer of England, tho' it happen the Treaſurer of England, and of the Exchequer, to be the ſame Perſon. 4 Inſt. 105.—How to be directed to reverſe a Fine. 5 Co. 39. b. (b) For the Form of the Writ upon the 27 El. vid. 1 And. 143.—Several Exceptions taken to a Writ of Error upon a Judgment in an Aſſiſe. Cro. Jac. 341. Godb. 248, 249. 1 Rol. Rep. 16, 17. 2 Bulſt. 164, 165, 167, 172.—Where a Writ of Error upon a Recovery with double Voucher, mentioned one Voucher only, Vide Cro. El. 124.—where it ought to recite all the Proceedings. Vide 1 Vent. 208. (c) Cro. El. 198. S. P. held a great Variance. Cro. Jac. 255. S. P. cited to have been adjudged. Stil. 183. S. P. adjudged.

2. **If a Writ of Error be directed to** Oliver St. John, **he being Chief Juſtice** de Banco, **to certify a Judgment** in querela, quæ fuit coram vobis & Sociis veſtris, **where it was before** Edmund Reeves & Sociis ſuis, **there not being then any Chief Juſtice, this is not good, but the Writ ſhall abate.** Hill. 1649. **ſeveral Writs abated for this Cauſe.**

3. **If a Writ of Error be directed to** Peter Pheaſant, **to certify a Judgment** in loquela quæ fuit coram vobis & Sociis veſtris, **where it appears by the Record that it was held** coram Edmundo Reeves & Petro Pheaſant, **this is a good Writ, for though in the Return** Edmund Reeves **is firſt named, yet this is well enough, in as much as** Peter Pheaſant **is alſo named, and it does not appear which of them was the eldeſt.** Hill. 1649. **between** Clarke **and** Sprigg **adjudged.** Intratur P. 1649. Rot. 458.

4. (d) **If a Writ of Error be directed to the Mayor, Aldermen and Recorder of** Launceſton in Cornubia, **and the Record is certified by the Mayor, Aldermen and Deputy-Recorder, the Court being held by Letters Patents, this is not well certified, in as much that this ought to be certified in the Name of the Judges of the Court; and it does not appear that the Recorder had Power to make a Deputy by the ſaid Letters Patents.** Hill. 1649. **between** (e) Sprye **and** Mill **adjudged, and the Writ abated accordingly.** Intratur P. 1649. Rot. 208.

(d) Stile 191, 219. like Point adjudged.

(e) Stil. 183, 203, 204. S. C. adjudged.

5. If an Aſſiſe be ſummoned before Juſtices of Aſſiſe, and they are after removed, and the Chief Juſtice *de B.* and another Juſtice are made Juſtices of Aſſiſe in the ſame County, and the Aſſiſe is taken before them, *& propter Difficultatem* adjourned in *B.* and Judgment there given for the Plaintiff, and a Writ of Error is directed to the ſame Chief Juſtice before whom the Aſſiſe paſſed, reciting the Aſſiſe ſummoned before the Juſtices of Aſſiſe by Name, *& poſtmodum capt'* before the Chief Juſtice, *&c.* but does not recite how the Aſſiſe came in *B. viz.* by Adjournment or otherways; this Writ of Error is not good, for as it took Notice of the Change of the Juſtices, *a fortiori* it ought to take Notice of the Adjournment, for by that both Judges and Court were changed. *Paſch.* 44 *El.* between the (f) Lord *Cromwell* and *Andrews.* *Yelv.* 3. adjudged *per totam Curiam*, againſt the O-

(f) Cro. El. 891. S. C. adjudged by all the Juſtices except Fenner, and that ex officio they ought to abate it, and ſaid, that a Record may be there before Judgment by Adjournment or Mittimus or after Judgment by Certiorari for the Safety of the Record. Noy 44. S. C. adjudged. Godb. 248. S. C. cited to be adjudged. 1 Rol. Rep. 15. S. C. cited to be adjudged.

pinion

pinion of all the Curſitors; but *Yelv.* 6. in the ſame Caſe it was adjudged that the Record was removed by this bad Writ, and that the Party might have a new Writ *de Recordo quod coram nobis reſidet.*

(a) Dyer 77. 6. But in the (a) 5 *Ed.* 6. where Judgment in a *Quare impedit* by the Statute of *Weſtm.* 2. was given by Juſtices of *Niſi prius*, and a Writ of Error thereof brought without ſhewing where the Judgment was given, it was held good, for the Record beginning and remaining in the Common Pleas, it was held not material where the Judgment was given. *Paſch.* 44 *El.* (b) in Lord *Cromwell's* Caſe. *Cro. El.* 891. *per Curiam*, and *Gawdy* ſaid, When the Record Begins in one Place, and is Finiſhed in another, there of Neceſſity in a Writ of Error the Proceedings in both Places ought to be mentioned.

(b) Yelv. 3. S. C. and a Diverſity taken between the Caſe of an

Aſſiſe and a Quare impedit, for the Aſſiſe muſt originally commence before Juſtices of Aſſiſe, and by Preſumption Judgment ſhall be there given, and not in B. but the Quare impedit muſt begin in B. and by Intendment Judgment ſhall be there given, tho' by the Statute to avoid a Lapſe Judgment may be given before Juſtices of Aſſiſe. 2 Bulſt. 171. S. C. and S. P. cited.

7. In a Writ of Error to reverſe a Fine as Couſin and Heir of the Conuſor, it need not be ſhewed in the Writ of Error how he is Couſin, for it is but a Commiſſion to examine the Errors, and needs not ſuch Certainty. *Paſch.* 5 *Jac.* between Sir *Rich. Champernon*, and Sir *William Godolphin. Cro. Jac.* 160, 161. adjudged, and tho' in ſome Writs it is ſhewed how Couſin, yet it is not of Neceſſity.

8. No Title need be ſhewed in a Writ of Error, unleſs it be in a ſpecial Caſe varying from the Common Courſe, as where a ſpecial Heir in Tail brings Error, or he in Remainder, becauſe he is to intitle himſelf. *Paſch.* 5 *Jac. Cro. Jac.* 161. *per Curiam.*

9. If a Writ of Error be brought upon a Judgment in an Aſſiſe *capt' coram J. Flemming nuper capital' Juſticiar' ad placita & J. Dodderidge uno Juſticiar' ad placita coram nobis tenend' aſſignat' Juſticiar' noſtris ad Aſſiſas*, this Writ is naught, for there was no ſuch Record before *Flemming Juſticiar' ad placita*, the Words *coram nobis tenend' aſſignat'* being omitted, and thoſe after *Dodderidge* cannot refer to the firſt. *Paſch.* 12 *Jac.* between (c) Sir *Chriſtopher Haydon* and *Godſalve. Cro. Jac.* 342. adjudged *per Curiam præter Dod'.*

(c) Godb. 248. S. C. and S. P. adjudged per Curiam, con. Dodderidge, who ſaid the Addition was Surpluſage. 1 Rol. Rep. 16, 17. S. C. and S. P. adjudged. 2 Bulſt. 164. &c. S. C. adjudged per Cur' con. Dod'.

10. If a Writ of Error be brought *in Recordo & proceſſu Aſſiſæ, &c. inter* A. & B. *ſummonit'* without ſhewing which was Plaintiff and which Defendant, it is well enough. *Paſch.* 12 *Jac.* between (d) Sir *Chriſtopher Haydon* and *Godſalve. Cro. Jac.* 341. adjudged, becauſe the Precedents are both ways.

(d) 1 Rol. Rep. 14. S.C. adjudged, becauſe it might be collected from Circumſtances, which was Plaintiff and which Defendant. 2 Bulſt. 164, 166, &c. 170.

11. If a Writ of Error be brought upon a Judgment in *quadam loquela* by Writ of certain Land and Paſture, without ſhewing in what Action this Plea was, it is naught. *Paſch.* 12 *Jac.* between (e) *Watſon* and *Bernard.* 1 *Rol. Rep.* 22. adjudged, and ſuch Writ quaſhed.

(e) 2 Bulſt. 212. ſeems to be S. C. but darkly reported, and by other Names.

12. But if a Man brings a Writ of Error to reverſe an Outlawry, it need not be ſhewed in what Action it was. *Paſch.* 12 *Jac.* 1 *Rol. Rep.* 22. ſaid by *Coke.*

13. If an Ejectment is brought againſt ſeven, and one dies, and Judgment is given againſt the Six, and laid *ad damnum* of the Seven, the Writ ſhall abate. *Mich.* 18 *Jac.* between (f) *Bethell* and *Parry.* 2 *Rol. Rep.* 210. adjudged, tho' *per Dod'* it might have been otherways, if the Writ had concluded *ad damnum* of the Six only.

(f) Palm. 152. S. C. adjudged, but per Dod' if the Writ of Error had mentioned the Seven only according to the Record, and concluded ad damnum of the Six it had been well.—If one of the Parties is dead yet he ought to be named in the Writ of Error. 2 Mod. 285.

14. If in a *Quare impedit* in *B. George Sherly*, Baronet, recovers againſt *Underhill*, and he brings a Writ of Error reciting a Record between *George Sherly*, Knight and Baronet, and *Underhill*; and thereupon the Record and Proceedings are ſent in *B. R.* and a *Mittitur* entered upon the Roll, (a) yet the Record is not removed. *Paſch.* 18 *Jac.* (b) *Hob.* 327. adjudged.

(a) Stil. 153. like Point per Roll Chief Juſtice, who ſaid the Variance was material, for theſe Additions are made Part of the Name, otherways where one is named Gent. in the Record, and Yeoman in the Writ.—where a Variance in the Addition ſhall abate the Writ. 1 Sid. 104, 193.— For Variances between the Writ and Record. Cro. El. 92. 172, 198. 1 Rol. Rep. 16. 2 Bulſt. 167, 168, 169, 174. Stil. 407.—But vide Stile 193. where the Court by Conſent of Parties made a Rule to proceed in the Writ of Error, notwithſtanding a Variance, for which it ought to have abated; of which the Reporter makes a Quære, the Record not being well removed.—A Writ of Error directed to the Juſtices is returned by one only, yet it was held the Record was removed. Stile 349. (b) Hut. 41. S. C. adjudged. Cro. Jac. 633. S. C. cited.

15. A Writ of Error was brought to remove a Record *in Curia Manerii de Cuttingby*, where the Record was *in Cur' Cuſtod Libertat' Angliæ Authoritate Parliamenti de Cuttingby*. *Mich.* 1652. between *Reckwith* and *Moyle*. *Stile* 344, 345. and ruled *per Roll*, that there was no direct Oppoſition between them, for that both may ſtand together, and tho' *de facto* it is the Court of the Lord of the Manor, yet Virtually and in Dignity it is the King's Court.

16. If a Writ of Error be directed *Majori & Aldermannis civitatis ſuæ* B. *ac Majori & Conſtabulario Stapulæ* B. *necnon vicecom' ejuſdem ac Ballivis Majori & Communitati ejuſdem Cur' Tols' ac Ballivis & Communitati Cur' ſuæ pulveriſat' & eorum cuilibet*, to certify the Record of a Judgment *loquelæ quæ fuit coram vobis in Cur' noſtra civitat' præd' ſine brevi noſtro, &c.* and the Record is certified thus, *viz. Placita in Curia Domini Regis Tols' civitat' præd' &c. coram* A. & B. *tam vicecomitibus Com' Civitat' præd' quam Ballivis Majore & Communitate ejuſdem Civitatis*; this is a good Writ of Error to remove this Record, for tho' it is not ſaid therein *coram vobis ſeu aliquibus veſtrum*, yet it ſhall be taken *diſtributivè*, *viz.* the Judgment upon a Plaint before all the ſaid Officers, or any of them. *Hill.* 22, and 23 *Car.* 2. between *Gay* and *Adams*. 2 *Sand.* 291. adjudged.

(O) What ſhall be a Removal of a Record.

1. If a Writ of Error be brought in Banco Regis to remove a Recovery of the Manor, of M. in M. cum pertinentiis where the Record of the Recovery is of the Manor of M. cum pertinentiis yet the Record is well removed. Co. 3. Marqueſs of Wincheſter, 2. adjudged per Curiam, for upon ſuch Writ the Recovery is reverſed.

(P) (a) Record removed.

(b) What Thing ſhall be removed thereby.

(a) Where upon a Writ of Error to reverſe an Outlawry upon an Indictment of Felony, the Record it ſelf or a Tranſcript only ſhall be removed. 1 Bulſt. 181. (b) If there be ſeveral Records between the ſame Parties, with which the Deſcription in the Writ of Error agrees, the inferior Court may remove which of the Records they pleaſe, Brydierd and Thomas. 1 Vent. 96. per Cur'. 1 Sid. 466. per Cur'. Raym. 189, 190. per Cur'. 2 Keb. 684. but note, final Judgment was not given in the Cauſes intended to be removed before the Return of the Writs of Error.—If the Record vary from the Writ of Error, yet the inferior Court ought to remove it. 1 Vent. 97. (c) Br. Record 46. S. C.

1. If a Writ of Error upon any Judgment but a Fine be brought in B. R. the Record it ſelf ſhall be removed there, and not the Copy only. 22 E. 3. 6. b. per Thorpe. (c) 40 Aſſ. 29.

(d) Godb. 248. S. P. 2 Rol. Rep. 253. Diverſity where Error is brought upon a Fine and where upon a Judgment in B.

2. (d) In a Writ of Error upon a Fine levied in Banco, the Tranſcript only ſhall be removed in Banco Regis, becauſe (e) if the Record it ſelf ſhould be removed, there is no Chirographer in Banco Regis to engroſs it, and then no quid Juris clamat could be brought, if it ſhould be affirmed there, for this lies only in Banco, and does not lie there, and this ſhall not be removed out of the King's Bench after it comes there. (f) 21 E. 3. 24. b. (g) 22 E. 3. 6. b. adjudged.

Vide 5 Co. 39. b.—Where upon a Judgment in B. the Record it ſelf is removed. 2 Rol. Rep. 253. but the Folio is miſprinted, and ſhould be 233. (e) That the very Record it ſelf ſhall not be removed till Judgment of Reverſal is given. Vide Dyer 99. b. (f) Fitz. Error 76. S. C. Fitz. Protection 62. S. C. (g) Fitz. Record 11. S. C.

(h) In the Original 'tis ſemblant. (*) Fol. 753. D. 1 Ma. 89. 4.

3. But if in B. R. they (h) conceive the Fine is to be reverſed, they may (*) ſend for the Note it ſelf and reverſe it. (i) 21 E. 3. 24. b.

(i) Fitz. Error 76. S. C. Protection 62. S. C.

(k) In the Original it is hors del filace.

4. Where they may ſend a Writ to the Treaſurer and Chamberlains to draw the Fine (k) off the File. (l) 22 E. 3. 6. b. adjudged.

(l) Fitz. Record 11. S. C.

(m) Br. Paroll on Plea, &c. 6. S. C. Br. Conuſance 6. S. C.

5. If a Writ of Error be brought in B. R. upon a Fine levied in the Huſtings of Oxford, the Record it ſelf ſhall be removed. (m) 50 Aſſ. 9.

(n) Tho' the Command of the Writ is to certify Recordum & proceſſum, yet the Courſe is only to certify the Declaration and Pleas omitting the Writs. Bridg. 57.——All is certified which is with the Chief Juſtice, but the original and judicial Writs remain with the Cuſtos brevium and other Officers, and are never certified but where Error is aſſigned for want of them. Cro. El. 84. Vide 1 Leon. 22. Cro. Jac. 479. 1 Rol. Abr. 790. pl. 6.——the Writ is directed to the Chief Juſtice, who only certifies the Body of the Record which remains with his Clerk, viz. the Prothonatory. Dal. 93. (o) Fitz. Error 10. S. C.

6. If a Writ of Error be brought in Banco Regis to reverſe a Judgment given in Banco, the (n) Original ſhall not be removed if it be not by ſpecial Matter, as if Error be aſſigned in the Original. (o) 24 E. 3. 24 b.

7. If a Writ of Error be brought in B. R. upon a Judgment in an inferior Court againſt the Plaintiff there, the Court may reverſe the Judgment, tho' the Original be not removed, no Error being aſſigned in the Original, for this is removed but to ſue here upon the ſame Original. 37 Aſſ. 5. adjudged.

8. If a Writ of Error be brought in B. R. upon a Judgment in Ireland, (a) the Original ſhall not be removed. 37 Aſſ. 5.

(a) Upon ſuch Writ of Error the Record it ſelf is not ſent, but a Tranſcript thereof only, by Reaſon of the Danger of the Seas. 1 Rol. Rep. 17. 2 Rol. Rep. 274. 2 Bulſt. 163, 164. Godb. 247. Cro. Jac. 534. —But vide Yelv. 117. at the firſt the Tranſcript only is ſaid to be ſent for the Danger of its Miſcarriage, but when it is come ſafe and entered in the Rolls here, then it ceaſes to be a Record in Ireland, and is a perfect Record here.—But yet in Cro. Jac. 534. it is ſaid if the Judgment be affirmed, the King's Bench in England ſhall not award Execution, but ſhall ſend a ſpecial Mandate to the Chief Juſtice in Ireland to do it.

9. Upon a Writ of Error in Parliament, upon a Judgment in B. R. the Roll in which the Record is, ſhall be brought in Parliament by the Chief Juſtice himſelf. 22 E. 3. 3.

10. (b) When a Writ of Error is brought in Parliament upon a Judgment given in B. R. the Chief Juſtice de B. R. ſhall carry with him in Parliament the whole Roll, in which is contained the Plea and Proceſs in which the Error is ſuppoſed, and there ſhall leave a Tranſcript of the Record in which the Error is aſſigned, and ſhall (c) re-carry in B. R. the Roll it ſelf, becauſe the Roll concerns other Matters, &c. and for that if the Judgment be affirmed, the Court de B. R. may proceed upon the Record there to grant Execution, and therefore if the Record it ſelf ſhould be removed, and Judgment there affirmed, and the Parliament diſſolved, there could not be any Proceedings thereupon to have Execution. 1 H. 7. 19. D. 23 El. 375. 19.

(b) For this vide 4 Inſt. 21. Cro. Jac. 341. 1 Bulſt. 166, 173.
(c) After the Tranſcript is examined. 4 Inſt. 21. ——In Godb. 249. it was ſaid to be at the Pleaſure of the Parliament to have either the Record or Tranſcript.

11. In an Action of Waſte brought in the *Huſtings* in *London*, there was a Verdict for the Plaintiff, which being after quaſhed for the Inſufficiency, and a new *Venire* awarded, whereupon a Verdict was given for the Defendant, and Judgment for him, and a Writ of Error being thereupon brought before Special Commiſſioners, *Mich.* 22 *Car.* 2, between (d) *Green* and *Cole*, 2 *Saund.* 254, it was reſolved that the firſt Verdict ſhould be certified in the Record, becauſe it was not ſet aſide, for that the Jurors had found againſt Evidence, or for any undue Practiſe or Miſfeaſance of the Parties, but only for the Inſufficiency thereof in Point of Law, which the Court had adjudged upon the Verdict appearing before them upon Record.

(d) 1 Lev. 309, 310. S. C.

Quod coram vobis reſidet.

(Q) When a Writ of Error ſhall abate, in what Caſes the Record is ſo removed that this Writ lies.

1. If a Record be removed by Writ of Error from one Court into another, if the Writ of Error be (a) abated the (b) Plaintiff may have a ſpecial Writ of Error quod coram vobis reſidet, &c. 3 H. 6. 3. (c) 26.

(a) Or quaſhed for any Imperfection therein, ſo the Record be ſufficiently deſcribed. Yelv. 6. (b) Where a Stranger brings a Writ of Error, and the Record is removed, and after he is nonſuit another that hath good Cauſe may bring a Writ of Error quod coram vobis reſidet. 3 Leon. 107.——Where a Writ of Error is abated by Plea or Death, the Record being well removed, the ſuperior and not the inferior Court ſhall proceed thereupon. Latch 198. per Cur'.—— And Error, quod coram vobis reſidet, lies: Stile 470. (c) Br. Error 4. S. C: Fitz. Record 16. S. C.

2. (a)

(a) 2 Fulst. 170.

2. (a) If the Writ of Error be disagreeable to the Record of the Judgment or otherways bad, yet if the Record be removed by it, another Writ quod coram vobis resider lies. M. 3 Ja. B. R. per Curiam.

3. If the Writ of Error mentions the Judgment to be in loquela inter A. and two others, where it was between A. and the two Persons and another Person also not named, the Writ shall abate, (b) and the Record is not removed to have a Writ of Error quod coram vobis resider, but he ought to have a new Writ. P. 1649. adjudged in a Writ of Error. Intratur M. 23 Car. B. R. Rot. 242. between Worgan and Kedgwin, and the like Judgment given the same Term between Hacker and Whatten, where the Writ of Error mentions five, and the loquela was between seven, so two of them were not named.

(b) Vide infra pl. 17.

(c) For this Vide 1 Sid. 193.

(*) Fol. 754.

4. (c) If the Addition of the Mystery of one of the Parties be mistaken in the Writ of Error, by which it abates, the Record is not removed so as to have a Writ of Error quod coram vobis resider; as if the Plaintiff in the first Action be named A. B. de London, Citizen and Sadler, and the Writ of Error is to (*) remove a Record in loquela inter A. B. de London, Citizen and Salter, &c. the Record is not removed by this, but shall abate and a new Writ of Error shall be awarded de novo. D. 1 El. 173. 16.

5. If the Writ of Error abates for Mistake of the Name of either Party, there no Writ of Error, quod coram, &c. lies, for that the Record is not removed thereby. (d) 9 H. 6. 4.

(d) Br. Error 5. S. C. Fitz. Error 21. S. C.

6. As if F. recovers in Debt against the Executor of B. and the Executor brings a Writ of Error of a Record between the Executor and B. the Testator, where it should be between the Executor and F. by which it abates, no Writ quod coram, &c. lies, for that the Record is not removed. (e) 9 H. 6. 4.

(e) Br. Error 5. S. C. Fitz. Error 21. S. C.

7. (f) If a Man 3 Jac. sues a Writ of Error to reverse a Judgment given in the Time of Queen Eliz. and the Writ is judicium redditum in Cur' nostra, by which is intended in the Time of King James, (in whose Time the Writ of Error is brought) for which the Writ is abated, it seems that he cannot have a Writ quod coram vobis resider, but ought to have a new Writ of Error, for the Record is not removed, for there is not any such Court mentioned. M. 3 Ja. B. R. Dubitatur.

(f) Lat. 198. S. P. adjudged. Yelv. 212. S. P. said to have been often adjudged con. and that the Record being brought in B. R. is well removed, and remains there.

8. If Judgment be given in an Account quod computet, and before the 2 Judgment a Writ of Error is brought in B. R. where the Writ is abated, because it does not lie before the 2d. Judgment, the Record is not removed by this; for the Writ commanded them to send the Record, si judicium inde redditum sit, but no Judgment was given here, upon which the Writ of Error lies thereupon. M. 12 Ja. B. R. between (g) Wood and Metcalf per Coke.

(g) 11 Co. 41. S. C. and S. P. 1 Rol. Rep. 85. S. C. and S. P.

9. This Writ may be awarded by the Court, in which the Record is returned. (h) 3 H. 6. 3. 26.

(h) Br. Error 4. S. C. Fitz. Record 16. S. C.

10. If Judgment be given against J. S. in B. R. and he and his Bail bring a Writ of Error in Camera Scaccarii, which is of a Record between J S. and the Bail, &c. this does not remove the Record, because the Bail are not Parties to the Record. H. 13 Ja. B. R. between (i) Verten and Sir James Sandeloe.

(i) Cro. Jac. 284. S. C. adjudged. Hob. 72. S. C. adjudged. 1 Rol. Rep. 294. S. C.

11. (a) If the Bail bring a Writ of Error as well upon the principal Judgment as in the Judgment against them upon a Judgment in Banco, or (b) in an inferior Court, and the Writ abates, because it does not lie upon the principal Judgment, it seems the principal Judgment (c) is not removed by this, but it seems that the Judgment against the Bail is removed, so that the Bail may have a Writ of Error quod coram vobis resident. M. 15 Car. B. R. between Williams and Worral; a Doubt among the Justices.

(a) Cro. Car. 561. S. P. dubitatur. 575. appears. 1 Lev. 137. S. P. dubitat' the Writ of Error being brought before any

Judgment against the Bail. (b) Where upon such Writ of Error upon a Judgment in Boston, the Court certified not only the Judgment upon the Scire facias, but also the principal Judgment and all Proceedings therein. Raym. 431. it was resolved to be good enough, because if they should have certified only the Judgment in the Scire facias, it could not well be understood, because in inferior Courts there are not several Rolls, but all Proceedings as well against the Defendant as Bail, are entered (for the most Part) in a Book, and never at large, unless a Writ of Error be brought, and there they make up an intire Record. (c) But the Writ of Error brought by the Bail, must of Necessity mention the principal Judgment. Cro. Car. 482.

12. If a Writ of Error be brought in B. R. to reverse a Judgment given in Banco, and in the Writ the Sum of the Damages in the first Action is mistaken, tho' a Mittitur be entered upon the Record upon the Receipt of the Writ of Error, yet the Record is not removed by it. H. 7. Ja. B. between Stocker and Kemish per Curiam.

13. (d) If the Judgment be given in Banco, tempore of one King, and the (e) Writ of Error brought tempore of another King, and the Writ of Error be to remove a Record in loquela quæ fuit in Curia nostra, & coram Justiciariis nostris, & per breve nostrum, between the Parties, and thereupon the Record is certified in B. R. yet it is not removed de Banco, so that no Writ of Error lies in B. R quod coram vobis resident. D. 1. 2. Ma. 106. 16.

(d) Lloyd and Bethel like Point. Bridg. 56, 57. 1 Rol. Rep. 200. and vide Cro. Car. 310.
(e) So where a Plaint was entered in

Cur' Marie Regine, and after tempore El. a Recordare was brought to remove a Plaint in Cur' nostra. March 30. pl. 97.

14. (f) If the Writ of Error mentions the Judgment to be coram, the Constable and Bailiffs, and the Record is, that it was coram the Deputy Constable and Suitors, and not the Bailiffs, the Record is not removed, but it ought to be abated, and a new Writ of Error to remove it. P. 1649. between Worgan and Kedgwin adjudged. Intratur M. 23 Car. B. R. Rot. 241.

(f) So where the Writ of Error mentions the Judgment to be given before the Mayor, Aldermen, but the Recorder

dermen and Recorder, and the Judgment certified was before the Mayor and Aldermen, Recorder was left out, the Record was not removed. Stile 131. per Roll Chief Justice.

15. If a Writ of Error be brought in B. R. in Hibernia, upon a Judgment (*) given in Banco there, and upon this the first Judgment is reversed, upon which a Writ of Error is brought in B. R. in England, upon the Judgment given in B. R. in Hibernia, and in this the Judgment given there reversed, and that the Judgment given in Banco in Hibernia shall stand in its Force; if there be Error in the Judgment given in Banco in Hibernia, a Writ of Error may be brought in B. R. in (g) Hibernia, in recordo quod coram vobis resident, tho' the Record it self is not removed, but only the Transcript, for the Danger of the Miscarriage over the Sea. Tr. 5 Ja. B. R. between (h) Comyn and St. John agreed.

(*) Fol. 755.

(g) I take this to be misprinted, and that it should be England.

(h) Yelv. 117, 118. S. C. but S. P. does not appear, but rather the contrary, for that the Writ here quod coram nobis resident was granted de bene esse, for it was said the Record was here, and at first the Transcript only is said to be sent, for the Danger of its being lost in the Carriage, but when it is come safe and entered in the Rolls here, then it ceases to be a Record in Ireland, and is a perfect Record here.

16. (a) If a Writ of Error brought in Camera Scaccarii, upon a Judgment given in B. R. by the Statute of 27 El. be abated by Death or otherwise, it seems that no Writ lies (b) there quod coram vobis reſidet, for upon this Writ of Error the Record it ſelf was not removed, but only the Tranſcript, and therefore he ought to have a new Writ of Error. Dubitatur H. 13 Jac. B. R. between (c) Verten and Sir James Sandeloe. Mich. 19 Jac. in Scaccario adjudged per Curiam.

(a) Cave and Holcha. S. P. Cro. Jac. 620. adjudged, not only becauſe the Record was not removed, but alſo becauſe the Proceedings were by ſpecial Power given by the Statute, and tho' Precedents were cited to the contrary, it was ſaid per Curiam, they had paſſed without Debate. 1 Jon. 14. adjudged, and it was reſembled to Error, by 31 Edw. 3. upon a Judgment in the Exchequer, where upon a Diſcontinuance, no Writ of Error quod coram vobis lies. (b) But where notwithſtanding for Error in Fact, it lies in B. R. de recordo quod coram vobis. Vide 2 Lev. 38. 1 Vent. 208. (c) Cro. Jac. 384. S. C. adjudged. Hob. 72. S. C. adjudged. 1 Rol. Rep. 294. S. C. adjudged.

17. If a Writ of Error be brought to remove a Record before the Biſhop of *Durham* and 8 others, and thereupon a Record before the Biſhop and 9 others is removed, the Record cannot be examined upon this Writ, (d) but there ought to be a new Writ *de Recordo quod coram vobis reſidet*; between (e) *Odell* and *Morton. Mich.* 7 *Jac. Cro. Jac.* 254. *per Curiam.* (f) but upon View of the Record it appeared the Writ was directed to the Biſhop and 8 others, and 8 of them only certified, and not the 9th, and it appeared not that he was dead or removed, and therefore alſo, *&c.*

(d) But Vide ſupra pl. 3. (e) Yelv. 211. S. P. adjudged, and that the Record being brought in B. R. was well removed, and remained there. 1 Bulſt. 129. S. C. but as to this Point darkly reported, and vide 2 Leon. 3. Godb. 73, 74. (f) Yelv. 212. S. C. and S. P. per Cur' for that the Anſwer was not ſo full as the Command by the Writ, and the Anſwer ought to be by all, unleſs it appears by the Return that ſome of them are dead. Vide Stile 154.

(R) Who may aſſign Error in the Thing.

The Vouchee.

1. (g) In a Writ of Error by the Vouchee, he may aſſign Error which was between the Demandant and Tenant. (h) 8 H. 4. 3. b. becauſe the Whole is upon one Original.

(g) F. N. B. 21. c. S. P. 1 Rol. Abr. 747. pl. 5. S. P. (h) Br. Error 39. S. C. Fitz. Error 61. S. C.

2. So the Tenant (i) may aſſign Error between the Demandant and the Vouchee. contra 22 E. 4. 32.

(i) But vide 1 Rol. Abr. 747. pl. 7.

3. So the ſecond Vouchee may aſſign Error between the Tenant and the firſt Vouchee, contra (k) 8 H. 4. 5.

(k) Br. Error 39. S. C. Fitz. Error 61. S. C.

4. If the Heir of the Husband brings a Writ of Error upon a Judgment given againſt him, being Vouchee in a Writ of Dower he may aſſign Error in the whole Proceſs. (l) 8 H. 4. 5.

(l) Fitz. Error 61. S. C.

5. The Vouchee may aſſign Error in the Judgment of the Value againſt himſelf. 18 E. 3. 38. b.

6. If Tenant in Tail within Age, being vouched in a common Recovery, appears by Attorney where he ought to appear by Guardian, he in Remainder may aſſign it for Error, becauſe he is privy to the Record in Regard of his Intereſt, and the Appearance of the Infant by

by Attorney was void. H. 13 Ja. B. R. between (a) Holland and Lee. (a) Bridg. 75, &c. S. C. with the Argument. 1 Rol. Rep. 301, &c. S. C. with the Arguments, but in both these Books it is said no Judgment was given, because the Writ of Error abated by the Death of one of the Plaintiffs, Holland and Dantsey & al'. Cro. El. 739. S. C. and S. P. per tot' Cur'. Darcy and Jackson. Palm. 123. 224. S. C. adjudged with the Arguments of the Counsel and Judges at large. Moor 622 pl. 850. S. C. but S. P. does not appear. All. 75. S. C. cited. Vide 1 Part. 604. pl. 4.

7. If A. recovers against 3 in a dum fuit infra ætatem, and two of the Tenants are within Age, yet all may bring a Writ of Error, and assign the Nonage for Error. Dyer 1, 2. Ma. 104, 10. adjudged.

8. If A. recovers against B. Debt and Damages, and after B. dies, and upon the Return of the Death of B. upon a testatum a Scire facias is awarded to the Sheriff of Kent, and another Scire facias to the Sheriff of Surrey, against the Tertenants, and the Sheriff of Kent returns C. Tertenant of the Land there, which was the Land of B. at the Time of the Judgment; and the Sheriff of Surrey returns D. Tertenant of the Land there, and upon this C. and D. appear, and C. pleads that J. S. a Stranger, is Tertenant of other Land, which was the Land of B. at the Time of the Judgment, to which A. the Plaintiff says, that J. S. is not Tertenant of any Land, &c. and D. pleads that he is not Tertenant of any Land, &c. upon which several Pleas several Issues are joined, and several Venire facias and several Trials, one in Kent and the other in Surrey; and the Issue is found against C. Scilicet, that J. S. was not Tertenant, and the other Issue is found for D. Scilicet, that he is not Tertenant, upon which several Verdicts Judgment is given accordingly for the Plaintiff A. if C. brings a Writ of Error only upon this Judgment (*) he cannot assign for Error that D. died before the Verdict was given for him, for he is a meer Stranger to the Proceedings between A. and D. for if A. had relinquished his Writ against D. C. could not prevent it; for he hath not pleaded that D. was also Tertenant, but hath put himself upon another Plea, and this being found against him he shall not have any Advantage of any Proceeding between D. and A. Mich. 14 Car. B. R. between (b) Angell and Cowper, adjudged per Curiam in a Writ of Error upon a Judgment in B. and the first Judgment affirmed accordingly, notwithstanding this Error. Intratur. (*) Fol. 756. (b) Cro. Car. 517. S. C. adjudged, and said by Holl arguend' that there being two several Scire facias's into several Counties, they be as two several Suits, and one not depending upon the other.

Assignee.

(S) In what Judgment Error may be assigned.

1. A Man may assign Error in Law upon a Judgment given against him by Default. 19 Ass. (c) 10. (c) This is misprinted in the Original, as here, and I suppose should be 8. and vide Stile 122.

2. A Man may assign Error in Fact, upon a Judgment given against him by Default. 19 Ass. (d) 10. (d) This is misprinted in the Original, as here, and I suppose should be 8.

3. As

3. As in a Writ of Meſne againſt two Coparceners, if one dies pending the Writ, and after both are forejudged, upon their Default, the Survivor and the Heir of him that is dead may aſſign for Error the Death, at the Time of the Judgment of him that is dead. 19 Aſſ. (a) 10. adjudged, tho' it be Matter in Fact.

(a) This is miſprinted in the Original, as here, and ſhould be 8. which vide, Br. Error 117. 1 Rol. Abr. 783. P. 1.

4. (b) In an (c) Ejectione firmæ againſt two, if after Iſſue joined, and Venire facias awarded, one of the Defendants dies, and after a Verdict is given at the Niſi prius for the Plaintiff, and after before Judgment the Plaintiff ſurmiſes the Death of one ut ſupra, and prays Judgment againſt the other, and Judgment is given accordingly, without any Anſwer to it by the (d) Plaintiff; if it be not true that he died as is ſurmiſed, it may be aſſigned for Error; for in as much as the Plaintiff had made this Surmiſe, this being a Matter of Fact, the Plaintiff cannot have any Anſwer thereto, (the Uſe not being thereupon to enter that the Plaintiff did not deny it) the Plaintiff hath no other Remedy but to aſſign it for Error. Mich. 11 Car. B. R. between (e) Tiffin and Lenton per Curiam.

(b) Hill and Tempeſt. S. P. Cro. El. 145. adjudged. 1 Leon. 175. adjudged, and vide 1 Vent. 249.

(c) Otherwiſe in an Aſſumpſit Beggot and Broughton. Cro. El. 105. adjudged. 2 Leon. 55. adjudged. 4 Leon. 60. adjudged, and ſaid, this was not like a Treſpaſs done by many, which is ſeveral, and every Aſſumpſit is joint, and vide 4 Leon. 15. but vide 8 & 9 Will. cap. 11. (d) This is printed as in the Original, but I think as well here as in ſeveral Places after, ſhould be Defendant, unleſs it muſt be intended of the Plaintiff in Error, who was Defendant in the Action. (e) Cro. Car. 426. S. C. adjudged, tho' objected that it ought to have been ſurmiſed before the Iſſue tried, and it was held per Curiam, that ſuch Surmiſe need not be in judicial Proceſs, and therefore tho' the Venire iſſued againſt a dead Perſon, yet one Defendant being alive, it is well enough. Jon. 367. S. C. adjudged. 1 Rol. Abr. 767. pl. 1. S. C. 798. J. 11.

5. An Action of Trover was brought by 5, and before Verdict one of them died, and yet they proceeded to Trial, and a Verdict was given for the Plaintiffs, and they ſuggeſted that one of them was dead, and Judgment was given for the reſt, this was Error, for every one ought to recover according to that Right only which he had at the Bringing the Action; and this differs from the Caſe in Treſpaſs where one Defendant dies. *Paſch.* 34 *Car.* 2. between (f) *Hedgewood & al'* againſt *Bayly & al'*. *Raym.* 463. upon a Writ of Error adjudged by 3 Judges (the 4th, *viz.* *Dolbin* doubting) and the Judgment reverſed accordingly, and *Spring*'s Caſe. 2 *Bulſt.* 262. diſapproved, and ſaid the Reaſon of the Judgment in that Caſe was miſtaken.

(f) 3 Mod. 249. S. C. cited. Diverſity taken where one Plaintiff and where one Defendant dies, in the laſt Caſe it may be ſuggeſted on the Roll.—But vide 8 & 9 Will. cap. 11. by which it is provided, That if there be two or more Plaintiffs or Defendants, and one dies, if the Cauſe of Action ſurvives to or againſt the ſurviving Plaintiff or Defendant, the Writ or Action ſhall not abate, but ſuch Death being ſuggeſted on the Record the Action ſhall proceed.

(T) In what Judgment, and by whom.

1. IN Debt, if the Plaintiff recovers by Judgment againſt B. who after dies, and upon a Scire facias againſt the Tertenants, 3 are returned Tertenants, who appear and plead ſeveral Pleas, and thereupon there are ſeveral Judgments againſt them, and after one of them brings a Writ of Error he cannot aſſign Error in the firſt Judgment given againſt B. as that the Judgment was not that B. ſit in Miſericordia, becauſe he is not privy thereto. Tr. 9 Car. B. R. between Hill and Widlach adjudged, and upon ſuch Writ of Error and Aſſignment the firſt Judgment affirmed.

2. If a Judgment be given againſt the Principal, and after another Judgment againſt the Bail, in a Scire facias, the Bail cannot in a Writ of Error aſſign Error in the firſt Judgment, becauſe he is not privy thereto. Hill. 11 Car. B. R. between (a) Hardy and Brown adjudged in a Writ of Error upon a Judgment in Rippon, but the Judgment given in the Scire facias againſt the Bail was reverſed. (a) Antea pl. 25. S. C. which vide with the Notes there.

(U) What Thing may be aſſigned for Error.

Fol. 757.

1. A Thing againſt the Certificate of the Juſtices of Record cannot be aſſigned. 1 Ma. 89. 3. Dyer 4. 5 Ma. 163, 56.

2. But otherways where the Aſſignment ſtood with the Certificate, &c. Dyer 1. Ma. 89. 3. as the Death of the Conuſor before engroſſing and recording the King's Silver.

3. But if the Judge of the Niſi prius dies before the Certificate of the Verdict and Day in Bank, and notwithſtanding the Clerk of the Aſſiſe returns the Verdict, which is received and entered, he cannot after aſſign for Error the Death of the Juſtice aforeſaid, becauſe it is contrary to what the Court de Banco did as Judges. Dyer 4. 5. Ma. (b) 163. 56. (b) Cro. Jac. 12. S. C. cited.

4. In a Writ of Error to reverſe a Fine, it cannot be aſſigned for Error, that the Conuſor was dead before the Teſte of the dedimus poteſtatem, for this is directly contrary to the Record of the Conuſance taken by the Commiſſioners. Dyer 1. Ma. 89.

5. In a Writ of Error to reverſe a Fine, it cannot be aſſign'd for Error that the Conuſor died between the Teſte of the Writ of Covenant and the Return thereof, tho' the Conuſance in this was taken by Dedimus poteſtatem in the Country, altho' it was objected that this Aſſignment ſtood with the Record, in as much as the dedimus poteſtatem iſſued before the Writ of Covenant, and ſo it might be that he died after the Conuſance, and between the Teſte of the Writ of Covenant and the Return) for it ſeems it cannot be intended or averred, that the Dedimus iſſued before the Writ of Covenant, for by the Dedimus the Writ of Covenant is ſuppoſed to be pending, and ſo this Death ought to be before the Conuſance taken, and ſo againſt the Certificate of the Commiſſioners. M. 38, 39 El. B. R. between (c) Wright and the Mayor of Wickam adjudged per Curiam. (c) Cro. El. 469. S. C. and S. P. per Cur'. Ow. 21, 22. S. C. but S. P. does not appear. Moor 413. Pl. 569. S. C. and tho' by what appears, the Aſſignment was as here, the Judgment was ſaid to be reverſed in Part; but in Cro. El. and Moor it is ſaid there was a Fault in the Writ of Error, and ſo not reverſed.

6. (d) But it may be aſſigned for Error, that after the Conuſance taken, and before the Certificate thereof, the Conuſor died, for this ſtands with the Record. (e) M. 38, 39 El. B. R. in Wright's Caſe. (d) Cockman and Farrer, S. P. Raym. 462. adjudged. 2 Jon. 181. adjudged, and held a manifeſt Error. (e) Cro. El. 469. S. C. and S. P. per Cur'.

7. In a Writ of Error to reverſe a Fine, it cannot be aſſigned for Error that the dedimus poteſtatem was directed to Sir Roger Manwood, Knight, where there was not any ſuch at the Time, but he was but an Eſquire, and yet he certified it according to the Writ, for

(a) Cro. El. 677. S. C. Cro. Jac. 12. **this is againſt the Record.** Dubitatur 43, 44 El. B. R. **between** (a) Arundel **and** Arundel.

adjudged per tot' Cur' and the Fine affirmed. Yelv. 33, 34. S. C. for as he may not ſay that there was no ſuch Man as R. Manwood, or that he did not take the Conuſance, ſo he ſhall not ſay he was not a Knight. 3 Mod. 141. S. C. cited.

7. If a Writ of Error be brought upon a Judgment in an inferior Court, and the Record certified is of a Court held before the Mayor, Bailiffs and Burgeſſes of *A.* by Cuſtom it cannot be aſſigned for Error that there is no ſuch Cuſtom, for this is contrary to the Record, and even what the Writ of Error it ſelf ſuppoſes, *viz.* that they have a Court. (b) *Paſch.* 12 *Jac.* between *Whiſtler* and *Lee.* 2 *Bulſt.* 243, 244. adjudged, and the Judgment affirmed, notwithſtanding this Error aſſigned.

(b) 1 Rol. Rep. 53. S. C. Cro. Jac. 359. S. C.

and per totam Cur' this Aſſignment being directly againſt the Record, it is not receivable wherefore the Judgment was affirmed.

8. If upon Diminution alledged, the Plaintiff in Error procures an ill Original to be certified, and the Defendant ſurmiſes there is a good Original, and upon a new *Certiorari* granted that is certified, the Plaintiff in Error cannot aſſign that the Proceedings were upon the firſt Writ, for that is contrary to the Record; for when there is a good Writ to warrant the Proceedings, (c) a Man ſhall never be admitted to ſay the Proceedings were upon the bad Writ. *Trin.* 18 *Jac.* between *Johns* and *Bowen. Cro. Jac.* 597. adjudged.

(c) Palm. 428.

9. If the Defendant appears by *John Green* his Attorney, it cannot be aſſigned for Error, that the ſaid *John Green,* was dead before the Day of Appearance, becauſe that is againſt the Record. *Mich.* 2 *Jac.* between *Morris* and *Fletcher. Cro. Car.* 53. adjudged upon a Writ of Error in the Exchequer-Chamber.

10. In a Writ of Error upon a Judgment in the Palace-Court, held *coram Jacobo Duce Ormond,* it cannot be aſſigned for Error, that the Duke was not there, becauſe that is contrary to the Record. *Trin.* 14 *Car.* 2. between (d) *Molins* and *Wheatly.* 1 *Lev.* 76. adjudged, the Court in Fact being held before his Deputy according to the Patent.

(d) 1 Sid. 94. S. C. adjudged. 1 Keb. 355, 388.

11. (e) In a Writ of Error upon a Judgment in an inferior Court, it may be aſſigned for Error, that the Mayor, who was the Judge, had not received the Sacrament, and taken the Oaths according to the 25 *Car.* 2. becauſe his Office is made void, and ſo the Proceedings *coram non judice. Mich.* 27 *Car.* 2. between (f) *Hipply* and *Tuck.* 2 *Lev.* 184. adjudged, and Judgment reverſed accordingly.

(e) Denning and Norris like Caſe. 2 Lev. 242. adjudged con. 2 Jon. 137.

(f) 2 Jon. 81. S. C. adjudged per Cur' præter Wild, and that altho' it cannot be alledged he was not Judge, yet it may be that he was not Mayor. 3 Keb. 606, 665, 721. S. C. and Judgment reverſed niſi.

(X) A Thing for his Advantage.

1. **A Man may aſſign the want of the Warrant of Attorney of his own Attorney, which is for his Advantage,** (g) 7 H. 4. 16. **and his own Default.** 11 H. 4. (h) 44. 88. b.

(g) Br. Error 37. S. C. (h) Br. Aſſiſe 56. S. C. Fitz. Judgment 71. S. C.

2. **In a** Scire facias **againſt the Bail, after Judgment againſt the Principal it is no Plea for the Defendant to ſay that the Principal died before Judgment, for this is againſt the Record, in as much as a Judgment ought not to have been given againſt a dead Perſon.**

Mich. 32, 33 El. B. R. between (a) Warter Plaintiff, and Perry and Spring Defendants, per Curiam, præter Wray, who doubted, Quære for by Intendment the Party was not present in Court at the Judgment, and this is Error in Fact.

(a) 1 Rol. Abr. 742. pl. 4. which vide antea and the Notes there, and vide my first Part, 674. pl. 2.

3. In a Writ of Error upon a Judgment given at the great Sessions in Wales, by the Statute of 34 H. 8. the Justices there may make Deputies who may give Judgment, and this Judgment was given by J. S. who is supposed by the Record to be a Deputy of the Justice, it cannot be (*) assigned for Error (b) that the said J. S. was not Deputy to the said Justice, for this is against the Record. Tr. 12 Ja. B. R. between (c) Floyd and Best adjudged in a Writ of Error.

(*) Fol. 758.

(b) Where by the Custom the Court was to be held before the Mayor and two Aldermen, and by the Record certified upon the Writ of Error it appeared, that the Court was held before the Mayor and A. and B. Aldermannis, it was assigned for Error, that A. was no Alderman. Cro. El. 320. but vide 1 Lev. 310, 311. (c) 1 Rol. Rep. 51. S. C. and S. P. ruled per Coke.

4. In a Writ of Error to reverse a Judgment given in B. in a Formedon, (d) it may be assigned for Error, that whereas the Record is, that the Venire facias to try the Issue which was tried in that Cause, was returned by J. S. Sheriff of the County of D. that the said J. S. was not then Sheriff of the said County, for this is against the Admission of the Court, who know their Officers and have recorded him to be the Officer of the Court. Mich. 11 Car. B. R. between (e) Smith and Smith, such Matter was assigned for Error, and this certified by a Record under the Seal of the Exchequer, Scilicet, that he was Sheriff, upon which the Judgment was affirmed. But some then said, that (f) this could not be assigned for Error against the Record of the Court de B. Intratur M. 10 Car. Rot. 192. V. 12 H. 4. B. R. Return de bre 40.

(d) Q. if the Word not is not wanting. (e) Cro. Car. 421. S. C. where after such Assignment the Defendant in Error pleaded that J. S. was made Sheriff by Letters Patents, &c. and the Plaintiff replied null tiel Record, and upon the Defendant's Producing in Court the said Letters Patents, the Judgment was affirmed, but it does not appear that it was insisted upon, that it was not assignable for Error. (f) Vide Yelv. 34.

5. If Error be assigned, that whereas by the Record the Defendant appears by Francis Dennington his Attorney, where his Name is Henry Dennington, and the Warrant of Attorney is certified, by which he is named Francis Dennington, the Judgment shall be affirmed, for this Averment is against the Record, and therefore it is not to be assigned for Error. P. 15 Car. B. R. between Weblyn and Kirby adjudged in a Writ of Error upon a Judgment in Banco. Intratur H. 14 Car. Rot. 1195.

6. (g) In a Writ of Error upon a Judgment in Banco, the Plaintiff may assign for Error, that whereas the Record de Banco is that the Defendant there appeared per J. Newton, his Attorney, and pleaded non sum informatus, upon which Judgment was given for the Plaintiff, that J. Newton was not then any Attorney, but was forejudged usque and during all the Term in which he so appeared and pleaded; and upon a Writ directed de Banco it is certified accordingly: And per Curiam, this may be assigned for Error, because this is not the Act of the Court as an Admittatur by Guardian is. H. 10 Car. B. R. between Bawtrie and Herne per Curiam, the Judgment given in Banco reversed accordingly. Intratur Tr. 9 Car. Rot. 207. contra Mich. 6 Ja. Rot. 435. and in another Action the same Term. Rot. 506. between Lumley and Marwood adjudged quia contra Recordum.

(g) Cro. Jac. 521. S. P. adjudged, contra where the Error assigned was, that he was no Attorney, and it was held that this was contrary to the Record, and if he was not an Attorney before, yet by the Admittance of the Court he was a good Attorney in this Action.

7. In

7. In a Writ of Error upon a Judgment in an inferior Court, if the Stile of the Court be Curia tenta coram J. S. Seneſchallo Curiæ, &c. a tempore, &c. an Error may be aſſigned that J. S. was not Steward at the Time of the Court held, for this is an Error in Fact. Hill. 9 Car. B. R. between Hatch and Nichols per Curiam, in a Writ of Error upon a Judgment in the Court of the Tower of London, but the Judgment was affirmed, becauſe the Error was not well aſſigned, for that it was aſſigned that J. S. had no Authority to hold Court, which was more general, and not Matter in Fact to be tried by the Country, but may be a Matter in Law.

(a) Cro. Jac. 28, 29. like Point adjudged. 244. like Point adjudged.

8. (a) Upon an Iſſue tried, if William Atkinſon de R. be returned and ſworn of the Principal, & alii de Circumſtantibus alſo ſworn, among whom William Atkinſon without Addition, is returned and ſworn, and a Verdict given for the Plaintiff, and Judgment in a a Writ of Error, the Defendant cannot aſſign for Error that the ſaid William Atkinſon of the Principal and of the Tales was one and the ſame Perſon, and ſo there were but 11 Jurors that tried the Cauſe, for this is againſt the Record, in as much as the Record is, that alii de Circumſtantibus jurati, of which, William Atkinſon is one, and therefore if the Record be true, this cannot be one and the ſame Perſon. P. 14 Car. B. R. between Stephenſon and Eſtoft per Curiam adjudged, this being aſſigned for Error, and the firſt Judgment affirmed accordingly.

Fol. 759.

9. In an Action upon the Caſe upon a Promiſe in the Borough Court of Bewdly, in Comitatu Worceſtriæ, if the Plaintiff declares there that the Defendant at Bewdly within the Juriſdiction of the Court in Conſideration of 1 l. given to him by the Plaintiff, aſſumed to pay 5 l. to the Plaintiff, if at any Time after he ſhould ſell at any Fair held within the Borough of Walſal, within the Juriſdiction of the ſaid Court, any Woollen Cloth, and avers that the Defendant after ſold at a Fair held at Walſal aforeſaid, within the Juriſdiction of the Court, a Woollen Cloth, and therefore he had brought this Action, and the Defendant pleads that he did not ſell the ſaid Woollen Cloth at Walſal aforeſaid, modo & forma, upon which Iſſue is taken and tried at Bewdly by a Venire facias de 12 de Burgo de Bewdly, and a Verdict and Judgment there given for the Plaintiff, the Defendant in a Writ of Error may aſſign it for Error, that Walſal is in Comitatu Staffordiæ, and out of the Liberty of the ſaid Borough of Bewdly, for this is a Matter in Fact. Mich. 11 Car. B. R. between Lea and Ceely adjudged in a Writ of Error, and the firſt Judgment reverſed, in which the Defendant in the Writ of Error, being warned, made Default, which in Law was as much as if he had pleaded in nullo eſt erratum, which acknowledges the Matter in Fact aſſigned, to be true. Intratur Tr. 11 Car.

10. If an Action upon the Caſe be brought againſt A. S. a Feme covert, as a Feme ſole, and ſhe appears and pleads thereto as a Feme ſole, and Judgment is given againſt her, and thereupon ſhe and J. S. her Husband bring a Writ of Error, they may aſſign for Error, that ſhe was a Feme covert at the Time of the Appearance and Pleading, &c. for otherwiſe the Wife might be taken in Execution without the Conſent or Conuſance of the Husband, and ſo he ſhould be bereaved of the Society of his Wife, for he hath no other Remedy to defeat it. Mich. 15 Car. B. R. per Curiam, between (b) Edwards and Simpſon, in a Writ of Error upon ſuch Judgment in the Court of Marſhalſea. Intratur Mich. 15 Car. 18 E. 4. 4. per Curiam, accordingly. Tr. 1651. between (c) Hayward and Williams adjudged in a Writ of Error, and the Judgment reverſed accordingly. Intratur H. 1649. Rot. 824.

(b) 1 Rol. Abr. 748. pl. 18 S. C. which vide antea and the Notes there.

(c) 1 Rol. Abr. 748. pl. 18. S. C. which vide antea, and the Notes there.

(Y) Who may assign the Error.

(a) Where he that hath Benefit by the Error.

1. Where the Error is by the Default of the Court, though this be for the Advantage of one Party, yet the Party that hath the Benefit by it may assign it for Error, for the Course of the Court ought to be observed. Mich. 15 Ja. B. R. between Holmes and Twiste, agreed per Curiam. Co. 8. Beecher 59. resolved.

(a) A Man shall not reverse a Judgment for Error, unless he can shew that the Error was in his Disadvantage. 5 Co. 39.

2. As if in an Action of Debt it be found, that the Defendant owes the Plaintiff 5 l. and the Jury assess Damages to 2 d. and Costs 2 d. and after Judgment is given, that the Plaintiff shall recover debitum & damna præd' to 2 d. and no Judgment is given for the Costs, tho' this is for the Advantage of the Defendant, yet he may assign it for Error, because this is the Error of the Court to alter the Manner of Judgments. Mich. 15 Ja. B. R. between Holmes and Twiste adjudged, and the Judgment reversed accordingly.

3. So the Plaintiff in a Suit retracts, by which Judgment is given against him, but he is not amerced as he ought, tho' this is for his own Advantage, yet for that the Amercement ought to be Parcel of the Judgment, and so the Judgment is not perfect without it, he may assign it for Error. (b) Co. 8. Beecher 59. resolved.

(b) Cro. Jac. 211. S. C. adjudged.

4. So in every Case where a Judgment is given against a Man in which he ought to be amerced, if he be not amerced he may assign it (*) for Error tho' it be for his own Advantage. Co. 8. Beecher 59. resolved.

(*) Fol. 760.

5. If (c) a Man be amerced by Judgment where he ought to be fined, tho' this be for his Advantage, yet he may assign it for Error, for that the Form of the Judgment, which is the Act of the Court, is altered by it. Co. 8. Beecher 59. adjudged.

(c) Cro. El. 84. S. P. adjudged, but for this vide Cro. El. 65, 107. 2 Sand. 47. Poph. 203.

6. In a Writ of Annuity, if the Issue be found for the plaintiff, and no Damages found for him, and Judgment is given according to the Verdict, the Defendant cannot assign it for Error that no Damages were tared against him, because this is for his Advantage, and here the Defect is not in the Judgment as it is where there is a Capiatur for a Misericordia, but in the Verdict. Mich. 12 Ja. B. R. between (d) Bent and Marsh per Curiam.

(d) 1 Rol. Rep. 88. S.C. adjudged.

2 Bulst. 279, 280, S. C. adjudged. 11 Co. 56. a. S. C. adjudged, by which Books it appears, that the Plaintiff before Judgment released his Damages, and had Judgment for the Annuity only, which made it more clear. Vide Post. 1 Rol. Abr. 784. pl. 1.

7. A Man cannot assign Error in Process or Delay, which is for his own Advantage. Co. 8. Beecher 59. resolved. Fitz. Nat. 21. F.

8. Upon an Issue between a Peer of the Realm and another, if the Venire facias be quod summoneat 12 liberos & legales homines, and does not say tam milites quam alios as the Register is, (e) tho' the Peer of the Realm may assign it for Error, yet the other cannot, because it does not concern him. P. 40 El. B. R. between the Earl of Worcester and Trade.

(e) Yet this being the Error of the Court, may be assigned for Error. Vide 2 Sand. 258.

(a) Moor 74. pl. 202. S. P.

9. (a) The Conuſor ſhall not aſſign Error in the Grant and Render, by which he himſelf takes the Eſtate, any more than the Conuſee ſhall do in the Conuſance, for that would be to defeat the Eſtate given him by the Fine. 5 *Co.* 39. *b.*

(b) 2 Keb. 450, 551, 605. S. C.

10. In a Writ of Error brought by the Tenant, it cannot be aſſigned for Error, that the Court awarded a Grand *Cape*, where they ought to have given Judgment for the Demandant to recover, becauſe the Award of the Grand *Cape* was only in Delay of the Demandant, and not to the Prejudice of the Tenant, and therefore not by him to be alledged for Error, becauſe not *ad grave damnum Querentis, &c. Paſch.* 20 *Car.* 2. between (b) *William* and *Gwyn.* 2 *Sand.* 45, 46. adjudged.

(Z) Where the Error came by the Default of him that aſſigns it.

(c) Br. Aſſiſe 56. S. C. Fitz. Judgment 71. S. C.

1. A Man may aſſign the Want of a Warrant of Attorney of his own Attorney, tho' it be his own Default. 11 H. 4. (c) 44. 48. b.

(A) In what Thing it may be aſſigned.

(d) Fitz. Error 63. S. C. Br. Error 46. S. C.

1. It cannot be aſſigned in a Record which is not in the Court where the Writ of Error is brought. (d) 11 H. 4. 47. b.

(e) Fitz. Error 63. S. C. Br. Error 46. S. C.

2. If a Man recovers an Annuity, and hath Judgment in a Scire facias thereupon, if a Writ of Error be brought upon the Judgment in the Scire facias only, he cannot aſſign Error in the firſt Judgment, for that was not come before them. (e) 11 H. 4. 4. 47. b. adjudged.

(f) The Writ of Error being directed to the Chief Juſtice, he only certifies the Body of the Record which remains with his Clerk, viz. the Prothonatory. Dal. 93. Bridgm. 57. but Vide 1 Rol. Abr. 753. pl. 6. and the Notes there.

3. In a Writ of Error upon a Judgment in Banco, if the Plaintiff aſſigns for Error, that whereas a Venire facias was returned by J. S. as Sheriff of the City of Exeter, he then was not Sheriff of the City, this Error is not well aſſigned, becauſe (f) the Venire facias is not certified upon which the Error is aſſigned, for this is upon Record in Banco and this Court cannot take Notice of this Matter of Record by Averment, without Certificate thereof; for he ought to have had this certified, and after Certificate thereof, then to aver, That whereas it is mentioned by the Record to be returned by J. S. Sheriff, that he was not then Sheriff. Paſch. 1649. between Barcroft and Richards adjudged, not being well aſſigned, and the Judgment affirmed accordingly. Intratur T. 23 Car. Rot. 1311. B. R.

(g) This is printed as in the Original, which I ſuppoſe miſprinted, for I find no ſuch Opinion. But vide 6 Edw. 4. 6.

4. Error may be aſſigned in every Part of the Record. (g) 18 E. 4. 9.

(B) In what Thing it may be assigned upon the Writ.

1. If a Feme recovers Land in a Writ of Dower, and after the Sheriff returns Damages from the Writ purchased to the Delivery of Seisin, when it ought to be from the Writ purchased usque diem Judicii, and after the Tenant brings a Writ of Error in redditione Judicii, (a) he may upon this Writ assign Error in the Judgment given for the Damages, upon the Return of the Sheriff for the last Judgment is not an Execution, but an Inquest (*) of Office by the Statute of Merton, and it is used always to bring but one Writ in such Case, and there is not any Writ quia Judicia reddita sunt, but Judicium. Trin. 11 Ja. B. R. between (b) Porter and Ager adjudged.

(a) Where the Judgment for the Dower stood. Stile 290. a Case cited by Roll. But for this vide Postea. 2 Bulst. 119.

(*) Fol. 761.

the Judgment for the Damages was reversed, and

1 Rol. Abr. 776. E. 6. 803. M. 9. (b) Cro. Jac. 324. S. C. but S. P. does not appear. S. C. but S. P. does not appear.

(C) In what Thing it may be assigned upon the Writ.

1. In a Writ of Error upon an Outlawry after Judgment in a Rediſſeiſin, an Error may be assigned in the Record of the Rediſſeiſin (Scilicet the Caption out of the Land) and this is sufficient to reverse the Outlawry, tho' the Judgment of the Rediſſeiſin continues, for the Outlawry cannot be good upon an erroneous Judgment. (c) 11 H. 4. (d) b. 94. adjudged. Co. 8. Altham (e) 158. b.

(c) Fitz Error 64. S. C.

but Note, the Writ of Error was brought as well upon the Judgment in the Rediſſeiſin, as upon the Outlawry. Br. Error 47. S. C. (d) This is misprinted in the Original, as here, and should be 6. (e) The Folio is misprinted here as in the Original, and should be 152.

(D) (a) How

(D) (a) How it may be assigned.

Jointly.

(a) If the Defendant in Error sues out a Scire facias quare Executionem habere non debet; this is meerly collateral to the Record removed, and yet by Matter ex post facto may become a Record, as if the Plaintiff upon the Return of the Scire facias appears and pleads a Releaſe or other Matter, as he well may, then this is a Record annexed to the firſt Record removed. But if upon the Return of the Scire facias the Plaintiff appears and aſſigns Errors, or hath a Day given him to aſſign them, and upon this Record aſſigns his Errors inſufficiently, this Scire facias is but a Piece of Paper filed to the Record, no Proceeding being thereupon. Yelv. 6, 7. (b) Br. Error 50. S. C.

1. **If two bring ſeveral Writs of Error and ſeveral** Scire facias **to reverſe a Judgment in an Aſſiſe againſt them, they may aſſign Errors jointly.** (b) 11 H. 4. 92. b. **adjudged.**

2. **In a Writ of Error it is no good aſſignment of Error,** quod in omnibus erratum eſt, **for the Court is not bound to inquire of the Errors, if the Party does not ſhew them to him.** (c) 6 E. 4. 6.

(c) Br. Attaint 86. S. C.

3. **In a** dum fuit infra ætatem **againſt three, as Daughters and Heirs of** J. S. **if the Plaintiff recovers by Default, and the Defendants bring Error and aſſign their Nonage for Error, without alledging that their Anceſtor died ſeiſed,** &c. Dyer 1. 2 Mar. 104. 10. **adjudged.**

4. If a Writ of Error upon a Judgment in an Aſſiſe be brought by four, and only one appears, and the others make Default, he cannot aſſign Errors alone till the other is ſummoned and ſevered. *Paſch.* 44 *Eliz.* between (d) *Cromwell* and *Andrews*. *Yelv.* 3, 4. adjudged.

(d) Cro. El. 891. S. C. adjudged. My 2d. Part 164. pl. 12. S. C.

5. So if upon a Judgment in a *Quare impedit* a Writ of Error be brought by the Biſhop and Incumbent, the Incumbent only without Summons and Severance cannot aſſign Errors. *Mich.* 3 *Jac.* between *Lancaſter* and *Low*. *Cro. Jac.* 94. adjudged.

6. If two are outlawed in an Appeal of Murder, and they bring a Writ of Error to reverſe it, and one appears, but the other does not (e) he ſhall not aſſign Errors till the other appears, becauſe he hath joined with him in the Writ of Error. *Hill.* 18 & 19 *Car.* 2. between the King and *Tothill & al*". 1 *Sid.* 316. adjudged.

(e) Yet vide 2 Rol. Rep. 490.

(E) A Man cannot aſſign Error in Fact and alſo Error in Law.

1. **A Man cannot aſſign for Error that Judgment was given for the Plaintiff, where it ſhould have been given for the Defendant,** (f) **and alſo an Error in Fact.** Trin. 10 Car. Camera Scaccarii **between** Davis **and** Selby **adjudged in a Writ of Error upon a Judgment in** B. R. **where the Error in Fact was, that the Plaintiff who brought the Action as Adminiſtratrix to her Husband, was a Feme covert, and that her Husband was then in full Life.**

(f) A Man cannot aſſign both Error in Law and Fact. 1 Sid. 147. 1 Leon. 105.—Tho' the Party may demur thereto, yet the Aſſignment of the Error in Fact, is no Waiver of the Error in Law.

2. But if a Man aſſigns for Error that the Judgment was given for the Plaintiff, where it ought to have been given for the Defendant, and alſo that he being Defendant appeared there by Attorney, being then within Age, and the Defendant in the Writ of Error pleads in nullo eſt erratum he ſhall not (a) have Advantage of the Doubleneſs, if he does not ſhew it ſpecially in his Plea, but the Judgment ſhall be reverſed, in as much as he acknowledges himſelf to be within Age, which is a Matter of Fact. Mich. 11 Car. B. R. between Mayhew and Baſnet adjudged, and a Judgment given in an inferior Court reverſed accordingly.

(a) Stile 69. 1 Lev. 76.

3. In a Writ of Error upon a Judgment in an inferior Court, if the Stile of the Court be Curia tenta coram J. S. Seneſchallo Curiæ, &c. a tempore, &c. an Error may be aſſigned that J. S. was not Steward at the Time of the Court held. Hill. 9 Car. B. R. between Hatch and Nichols per Curiam, in a Writ of Error upon a Judgment in the Court of the Tower of London, for this is Error in Fact.

4. But in the ſaid Caſe if the Error be aſſigned that J. S. had not any Authority to hold Court, this is not well aſſigned, for this is uncertain, and (*) Matter in Law peradventure, and more general, and not Matter of Fact to be tried by the Country. Hill. 9 Car. B. R. between Hatch and Nichols adjudged per Curiam, and the Judgment given in the Court of the Tower of London, affirmed accordingly. Intratur Trin. 9 Car. Rot. 426.

(*) Fol. 762.

5. In a Writ of Error upon a Judgment in B. R. he cannot aſſign for Error that there is not any Bail filed for the Defendant, for this is not material if he was in Cuſtodia Mareſchalli, &c. for if he was in Cuſtodia, the Proceedings might be againſt him without any Bail, (b) but if he was not in Cuſtodia he ought to aſſign the Error, that he was not bailed nor in Cuſtodia. Hobart's Reports, Caſe 341. (c) Lancaſtel's Caſe, and 342. between (d) Willis and Woodhouſe adjudged; but Quære, Whether he may aſſign it contrary to the Record, That he was not in Coſtodia Mareſchalli when the Declaration ſuppoſes it, and the other ſo anſwers.

(b) Tho' he that appears and pleads as a Priſoner in Cuſtod' Mareſchal', can't after aſſign for Error that he was not in Cuſtod' Mareſchal'. Cro. Jac. 568. adjudged. (c) Hob. Fol. 264. S. C. (d) Hob. Fol. 265. S. C.

(F) (e) At what Time it may be aſſigned.

(e) Time to aſſign Errors denied per Cur', who ſaid the Bringing a Writ of Error was Delay enough. Stile 208.

1. After a Scire facias awarded againſt the Defendant, he cannot aſſign any Error which is Matter of Fact. (f) 22 E. 4. 45. b. Fitz. Nat. 20 E. 8. H. 4. 23.

But vide Yelv. 7. (f) Br. Error 188. S. C.

2. As in Avoidance of an Outlawry, to ſay that he was in France, or other Place under ſuch Captain in War, for this is Matter of Fact, for it ſhall be tried by Certificate of the Captain. (g) 22 E. 4. 46.

(g) Br. Error 188. S. C.

3. Or in Avoidance of a Judgment given for the Plaintiff in a Writ of Dower, to ſay that there is not any Warrant of Attorney for the Tenants certified, for this is Matter of Fact. (h) 22 E. 4. 45. b. adjudged: But Quære this, for it ſeems this is not Matter of Fact, but to be tried by the Record.

(h) Br. Error 188. S. C.

4. But after a Scire facias awarded, the Plaintiff may aſſign Errors in the Record. 22 E. 4. 45. b. 34 Aſſ. (a) 6.

(a) This is miſprinted in the Original, as here, and I ſuppoſe ſhould be 7.

5. As to ſay there is not any Original. 22 E. 4. 45. b.

6. Or to ſay in Avoidance of an Outlawry, that he was but quarto exactus, for this is to be tried by the Record of the Exigent, when it is certified. 22 E. 4. 46.

7. After Errors aſſigned, and the Defendant had pleaded a Releaſe, the Plaintiff diſcontinued, and becauſe there was a manifeſt Error in Part of the Record remaining in *B.* he obtained a Writ out of Chancery to the Chief Juſtice, to remove the Reſidue of the Record, which being removed in *B. R.* he would aſſign Errors upon the new Part removed. *Mich.* 34 *Eliz.* between (b) *Yates* and *Windham*. *Cro. El.* 155, 281. it was ruled *per Curiam*, that in as much as the firſt Writ was diſcontinued, and this is a new Writ, the Plaintiff is not tied to the former Errors, but may ſhew others at his Pleaſure, for it is now as if none were aſſigned before, and he may aſſign other Errors out of the Record, or in the Record, and the Removing the Record in this Manner, was held allowable, but this being entered upon another Roll, it was held a Miſ-entry, and the Plaintiff was put to a new Writ of Error.

(b) Wordman and Yates. 2 Leon. 2. S. C.

(G) At (c) what Time it ought to be aſſigned.

(c) Where after a Statute Merchant ſent by Mittimus out of Chancery in B. and Execution there awarded, and Error brought in B. R. it cannot be aſſigned for Error, that one of the Seals was wanting. Moor 570. pl. 778. agreed, and ſaid, that upon the Mittimus into the Common Pleas, the Statute is always ſhewed. (d) Fitz. Error 11. S. C.

1. THE Plaintiff in Error ought to aſſign ſame Error before he ſhall have any Scire facias ad audiend' Errores. (d) 24 E. 3. 31.

2. If A. recovers againſt B. in Banco, and C. is Bail for B. and after a Scire facias is awarded againſt C. the Bail, and after 2 Nihils returned a Judgment is given againſt C. and after he brings a Writ of Error in Banco Regis upon this Judgment, he cannot aſſign for Error that there was not any Capias returned againſt B. the Principal, before the Scire facias ſued, ſo that if he had appeared and had not pleaded it, or had been returned Summoned, and had not appeared and pleaded this Matter, he ſhould not aſſign it for Error, becauſe he might have pleaded it to the Scire facias, and here the Return of 2 Nihils amounts to a Summons and is all one with it, and this is a Matter of Record and not a Matter of Fact, and there would be no End if he ſhould be admitted to aſſign it after ſuch Judgment, in which if he had appeared he might have been aided. Trin. 1651. between (e) Barcock and Tompſon adjudged, and the firſt Judgment affirmed. Intratur M. 1650. Rot. 444.

(e) Stile 281, 288, 323, 324. S. C. adjudged.

(a) (b) *Scire*

(a) (b) *Scire facias* (c) *ad audiendum.*

Fol. 763.

(H) (d) In what Caſes it ſhall be ſued.

1. IF theſe Matters which are aſſigned for Error, appear to the Court to be no Error, nor Colour of Error, it ſhall not grant any Scire facias. (e) 18 H. 6. 18, 19. Curia.

2. If a Matter of Fact be aſſigned for Error, a Scire facias ſhall be granted. (f) 18 H. 6. 19.

(a) againſt an Adminiſtrator generally, or by his particular Name 1 Rol. Rep. 23. 2 Bulſt. 231.

(b) Anciently the Writ againſt the Tertenants was Special, naming them, but of late the Courſe hath been to award the Writ generally. Bridgm. 72. (c) The Scire facias againſt the Tertenants is not ad audiend' errores, but ad audiend' proceſſum & Recordum. 1 Lev. 72. per Cur'. 1 Keb. 352. (d) An Attaint lies againſt him which recovered, and againſt the Tertenant, but Error lies only againſt him which recovered, and a Scire facias ſhall go againſt the Tertenant. 2 Bulſt. 244. 1 Rol. Rep. 37. 302. Bridg. 72. and the Judgment may be reverſed againſt the Parties to the Judgment, and their Heirs, tho' they have nothing in the Land. (e) Fitz. Error 24. S. C. (f) Fitz. Error 24. S. C.

(I) (g) Againſt whom it lies.

(g) Where upon the Reverſal of an Outlawry there ſhall be a Sci. fa. againſt the Lords mediate and immediate. Hard. 164. 1 Sid. 316. (h) Fitz. Error 62. S. C.

1. IF a Man condemned in an Aſſiſe, be outlawed for the Fine of the King, and he brings a Writ of Error to reverſe the Outlawry only, there ſhall not be any Scire facias againſt the Recoverer, becauſe the Outlawry is at the Suit of the King only. (h) 7 H. 4. 40. b.

2. But otherways it had been if the Writ of Error had been brought of the Judgment and the Outlawry alſo. (i) 7 H. 4. 40. b.

(i) Fitz. Error 62. S. C.

3. If a Man be outlawed at the Suit of a common Perſon, and he brings Error to reverſe the Outlawry, he ought to ſue a Scire facias againſt the Party. (k) 7 H. 4. 40. b. 9 H. 4. 3. admit contra. (l) 11 H. 4. 94.

(k) Fitz. Error 62. S. C.

(l) I ſuppoſe this miſprinted here, as in the Original, for I find no ſuch Opinion in the Year-Book.

4. If a Man be outlawed upon Proceſs at the Suit of A. who dies, and he brings Error to reverſe the Outlawry, he ſhall not ſue a Scire facias againſt the Executor, becauſe he cannot proceed upon this Original, which is abated by the Death of the Teſtator. (m) 9 H. 4. 3.

(m) Br. Error 44. S. C. Fitz. Utlegary 39. S. C. Br. Utlegary 9. S. C.

5. Upon a Writ of Error againſt the Heir of him that recovers, a Scire facias lies againſt the Heir and Tertenants. (n) 8 H. 4. 17.

(n) Br. Error 42. S. C. Fitz. Error 60. S. C.

(a) 1 Leon. 290. like Point in a Writ of Diſceit to annull a Fine of ancient Demeſne Lands, and that the Tertenant is not bound thereby till, &c.

6. (a) If a Writ of Error is brought to reverſe a Common Recovery, the Court (b) before Reverſal thereof ought to award a *Scire facias* againſt the Tertenants, and this is not meerly diſcretionary, but *ex neceſſitate juris*, for they may have a Matter to plead in Bar as a Releaſe, *&c. Hill.* 2 & 3 *Jac.* 2. between *Kingſton* and *Herbert.* 3 *Mod.* 119. *per Curiam*, but *adjornatur*.

(b) It is the beſt Way to award a Scire facias againſt the Tertenant, before the Court proceeds to the Examination of the Errors, for he may have ſomething to plead in Bar, and ſo ſave the Court the Trouble of examining the Errors; and if the Judgment ſhould be reverſed againſt the Party and Privy, yet the Plaintiff could not have Reſtitution till a Scire facias, &c. Dyer 321. a. —That ſuch Scire facias may be granted before or after at Diſcretion. Hard. 163.

(K) How it ſhall be joined in Demurrer or Rejoinder to the Error aſſigned.

1. If a Man outlawed brings a Writ of Error to reverſe the Outlawry, and aſſigns his Errors, the King's Attorney ſhall not plead in nullo eſt erratum, and ſo a Demurrer, as they uſe to do between common Perſons, but only upon the Aſſignment of the Error the Court ſhall give a Day to the King's Counſel to maintain the Outlawry, and it is entered Curia adviſare vult till the Outlawry is reverſed or affirmed. Mich. 14 Ja. B. R. per Curiam and Clerks in Chapman's Caſe.

2. If the plaintiff in the Writ of Error aſſigns an Error in Fact, if the Defendant will put in Iſſue the Truth of the Fact, he ought to rejoin by Denial of the Fact, and ſo join Iſſue thereupon, and ſhall not ſay (c) in nullo eſt erratum, for by this he acknowledges the Fact alledged to be true. Dyer 3 E. 6. (d) 7 E. 4. 16. and (e) 9 E. 4. 32. b. it ſeems ſo to be intended.

(c) This is in Nature of a Demurrer. Cro. Jac. 29. Cro. Car. 53. 1 Lev. 311.—It is a Confeſſion of an Error in Fact well aſſigned. Raym. 231. 1 Lev. 294.—But not of a Matter aſſigned contrary to the Record. Cro. Jac. 12. 521. Raym. 231. (d) Br. Error 165. S. C. Fitz. Error 43. S. C. (e) Br. Error 93. S. C. Fitz. Error 45. S. C.

3. But when an Error in Fact is aſſigned, if the Defendant will acknowledge the Fact to be ſo as alledged, and yet that by the Law this is not Error, he ought to rejoin in nullo eſt erratum, for by this he acknowledges the Fact, and yet that by the Law that it is not Error. Dyer 3 E. 6. S. 7.

4. If Error be alledged in the Body of the Record, in nullo eſt erratum is a good Rejoinder, for this ſhall put the Matter in the Judgment of the Court, the Record being agreed to be ſo. (f) 9 E. 4. 32. b.

(f) Br. Error 93. S. C. Fitz. Error 45. S. C.

Fol. 764.

5. So if Error be alledged in a Matter of Record, which is not of the Body of the Record, but in a collateral Thing as quod non habetur aliquod Recordum of Reſummons, in nullo eſt erratum is a good Rejoinder, for if the Plaintiff in the Writ of Error does not pray a Diminution, and thereupon procure a Certificate from the inferior Court, that there is not any Reſummons before the Rejoinder entered, this Aſſignment is of no Effect, but void in as much as this is to be tried by the Record it ſelf; and no Diminution can be alledged after the Rejoinder entered. (g) 9 E. 4. 32. b. (h) 7 E. 4. 16. for if the

(g) Fitz. Error 43. S. C. Br. Error 165. S. C. 1 Leon. 22. (h) Fitz. Error 45. S. C. Br. Error 93. S. C.

Defendant will confeſs the Error, yet the Court ought not to reverſe the Judgment till they are aſcertained of the Error by the Record it ſelf.

(L) (a) (b) Diminution.

(a) Where the Record not rightly certifiedupon a Writ of Error upon an Outlawry

1. A Man cannot alledge Diminution (c) contrary to the Record which is certified. Paſch. 41 El. B. R.

upon an Indictment for Felony. 1 Bulſt. 181.—In Error to reverſe an Outlawry upon an Indictment for Murder, it being aſſigned for Error, that the *exactus* was ad *Comitatum*, without ſaying *Weum*, the Court upon the Prayer of the Attorney General, ſhewing the King had ſeiſed his Lands, &c. awarded a Certiorari to the Coroners to certify where the *Exact'* was, in order to amend the Return. Lat. 210. (b) Upon a Writ of Error upon a Bill of Exceptions, Diminution cannot be alledged, for he muſt hold himſelf to the Matter in the Bill ſealed, and if it is not there, it was his Folly to omit it. 2 Inſt. 427. (c) For this vide Godb. 267, 408. 2 Rol. Rep. 353. Cro. Jac. 369.

2. As if in a Writ of Error it be certified that the Judgment was quod Defendant ſit in miſericordia, the Defendant in the Writ of Error cannot alledge Diminution, ſcilicet, that the Record is quod capiatur, becauſe this is contrary to the Record certified. Paſch. 41 El. B. R.

3. If upon a Writ of Error the Record be certified, that a Challenge was to the Sheriff for Couſinage, and after thereupon a Venire facias was awarded to the Coroner upon Diminution, it cannot be certified that the Challenge to the Couſinage was after the Return of the Venire facias, becauſe this is contrary to the Record before certified, for nothing can be certified but that which ſtands with the firſt Record. Trin. 13 Ja. B. R. between (d) Floyd and Bethell.

(d) 1 Rol. Rep. 200. S. C. adjudged.

4. In a Writ of Error brought in *B. R.* upon a Judgment in the Common Pleas, the want of a Warrant of Attorney being aſſigned for Error, the Plaintiff prayed one *Certiorari* to the Chief Juſtice, and another to the *Cuſtos Brevium*, both which returned *non inveni aliquod* Warrant, and the Defendant dying the Plaintiff by *Fourny*'s Accounts, brought a new Writ of Error againſt the Son and Heir of the Defendant, who appearing, alledged Diminution in that the Warrant of Attorney was not certified, and prayed another *Certiorari* to the *Cuſtos Brevium*, and it was urged the Return was not *quod non habetur aliquod Warran'* but (e) *quod non inveni, &c.* ſo that if upon the 2d. a Warrant ſhould be returned, it would not be repugnant. *Trin.* 26 *Eliz.* between *Dayrell* and *Thinn.* 1 *Leon.* 22. But it ſeemed to *Wray* Chief Juſtice, that it would be hard to grant a new *Certiorari* in this Caſe, tho' if any Variance could be alledged, it would be otherwiſe, as adjudged in the Caſe of one *Laſſels*, where it was certified there was no Warrant of Attorney, and becauſe the Original was *inter Laſſels Executor' Teſtamenti, &c.* where he was not named Executor in the firſt *Certiorari*, and upon the Matter a new *Certiorari* was granted.

(e) Vide Smith and Skipwith. Cro. Jac. 277. 1 Bulſt. 21. where upon the firſt Certiorari it was returned there was no Warrant of Attorney in that Term wherein the Action was

5. (f) Diminution cannot be alledged upon a Writ of Error brought upon a Judgment (g) in any inferior Court. *Paſch.* 13 *Car.* 1 *Sid.* 40. *per Curiam.*

commenced, and another Certiorari was awarded. (f) Vide Godb. 267. (g) As Ely 1 Sid. 147. —the Seſſions of Peace. 1 Sid. 364.—But may in Error upon a Judgment in Wales, and Counties Palatine. 1 Sid. 147, 364.—So it may in Error upon a Judgment before Juſtices of Oyer and Terminer. 1 Sid. 40.

(M) (a) (b) Diminution.

(c) *Certiorari.*

(a) How the Record to be certified diminutum, vel non vide 2 Rol. Rep. 237. —If the Judges of the Common Pleas, or other Judges upon a Writ of Error, will not certify all the Record, then the Party that ſues the Writ of Error may alledge Diminution of the Record, and pray a Writ to the Juſtices that certified the Record before, to certify the whole Record. F. N. B. 25. a. (b) Not to be alledged after in nullo eſt erratum pleaded, Godb. 267. 1 Leon. 22, 23. 176. Palm. 285. (c) For the Form F. N. B. 25. b. 2 Rol. Rep. 353.—and that upon Diminution the Writ ought to iſſue out of the ſame Court where alledged. 2 Leon. 2, 3. (d) 2 Rol. Rep. 471. Stile 352.

1. After in nullo eſt erratum pleaded, the Court to inform their Conſciences may award a Certiorari (d) to amend the Record. Paſch. 11 Ja. B. R. Co. 5. Biſhop 37. b.

(e) Cro. El. 155, 281, 836. 837. 2 Leon. 3. Cro. Jac. 6. 141. 445, 446.
(f) Cro. Jac. 92, 93. S. C. but S. P. does not appear.

2. So after in nullo eſt erratum pleaded, the Court may award a Certiorari (e) to reverſe the Judgment. Paſch. 11 Ja. B. R. between Hunſley and Osburn adjudged. Co. lib. d' Entries, Fol. 267, 268. Boſwell's Caſe, and Fol. 242. Downal's Caſe, Fol. 266. (f) Lancaſt and Loa. Mich. 2 Car. between Weaver and Felton adjudged. Intratur Hill. 1 Car. Rot. 647. B. R.

(g) 1 Rol. Rep. 432. S. C. adjudged. 3 Bulſt. 224. S. C. but S. P. does not appear.

3. If after in nullo eſt erratum pleaded, another Part of the Record is brought in by Certiorari, and made of Record there, the Court ought to reverſe the Judgment, if the Matter ſo requires. Co. 5. Biſhop 37. b my Reports, 14 Ja. between the (g) Biſhop of Rocheſter and Young adjudged, which Intratur Paſch. 33 El. Rot. 361.

(*) Fol. 765.
(h) 1 Jon. 139, 140. S. C. adjudged, and ſaid, that the Report of Biſhop's Caſe does not agree with the Record, the Defendant not having pleaded in nullo eſt erratum, &c.

4. After in nullo eſt erratum pleaded, if one Party alledge upon Record a Diminution of the Record to reverſe it, and prays a Certiorari to certify it, and thereupon a Writ of Certiorari is ſued out, and the Record thereupon is certified, but before it is entered of Record the Court is informed of this Matter; this ſhall not be received, becauſe it comes in by the Prayer of the Party after in nullo eſt erratum pleaded, which is not to be allowed, but upon Information to the Court the Court may grant it. Mich. 2 Car. (*) between (h) Weaver and Felton, B. R. adjudged, and ſuch Certificate diſallowed, and a new Writ of Certiorari granted by the Court, which Intratur Hill. 1 Car. Rot. 647. and then the Record of the Biſhop's Caſe was ſhewn to the Court, where the Defendant did not plead in nullo eſt erratum, as the Book is, Co. 5. But it paſſed againſt the Defendant by nil dicit, and after Diminution alledged, as it is in the Book.

5. In Treſpaſs in B. R. Judgment was given for the Plaintiff by Default, and a Writ of Error brought in Camera Scaccarii, and there aſſigned for Error, that there was not any Writ of Inquiry of Damages filed, and upon a Writ of Certiorari, certified that there was not any ſuch Writ, yet after another Certiorari granted, and upon this the Writ of Inquiry certified, and upon this the Judgment affirmed. Hill. 5 Car. between Roror and Eſcourt adjudged.

6. In

6. In a Writ of Right in B. R. after Judgment a Writ of Error is brought in Camera Scaccarii, and the want of Continuances assign'd for Error, and upon a Certiorari the want of Continuances certified; yet after upon another Certiorari the Continuances were certified, and upon this the Judgment affirmed. Hill. 5 Car. between Waterhouse and Coply adjudged, and a like Case between Travis and Scot.

7. In an Action upon the Case in Banco, Hill. 6 Car. and Judgment after given for the Plaintiff upon Demurrer, and upon this a Writ of Error brought and assigned for Error, that there was not any Original in the Cause de H. 6. Car. and upon a Certiorari it was certified accordingly; and upon this the Plaintiff says, That there was an Original in the said Cause de P. 6 Car. and for the Non-appearance of the Defendant upon the Return of the Summons a Capias awarded, returnable T. 6 Car. and an alias returnable M. 6 Car. and a Pluries returnable H. 6 Car. upon which the Defendant appeared, and the Plaintiff declared, and the Defendant pleaded, &c. and upon this prayed a Certiorari to certify the Original, which is certified accordingly, but none of the other Writs nor any Continuance is certified between Pasch. 6 Car. and Hill. 6 Car. and so a Discontinuance of the Suit for what appears to the Court. Mich. 13 Car. B. R. between Lownes and Coggan adjudged, and the first Judgment reversed for this Cause.

8. (a) In a Writ of Error, if Error be assigned in the Original, and thereupon a Certiorari is granted and an Original is certified, which is erroneous, after the other Party prays a Certiorari for another Original; and thereupon another Original is certified, which is a good Original; and after in nullo est erratum is pleaded, the Court ought to intend that the Judgment was given upon the good Original, and not upon the erroneous Original, and so ought to affirm the Judgment; for they ought to intend more favourably for the Judgment, and to intend it to be well given. 21 Ja. between (b) Crouch and Hains. B. R. adjudged in a Writ of Error.

(a) Cro. Car. 91. S. P. per Cur'.

(b) Godb. 407. S. C. 2 Rol. Rep. 352, 353. S. C.

9. So in a Writ of Error, if Error be assigned in the Original, and upon a Certiorari granted, an erroneous Original is returned, and upon this in nullo est erratum is pleaded, and after the Court ad informandam Conscientiam grant another Certiorari for another Original, and upon this a good Original is certified, the Court ought to intend that this is the Original upon which the Judgment was given, in Favour of Judgments which ought to be intended to be good. Mich. 1649. between (c) Kerton and Avery, and the Judgment in Banco affirmed accordingly. Intratur Mich. 23 Car. Rot. 239.

(c) Stile 175, 176. S. C. obscurely reported.

10. If in a Writ of Error upon a Fine, an Error be assigned in the Proclamations, upon which a *Certiorari* goes to the *Custos Brevium*, and upon his Certificate it appears, that 2 of the Proclamations were made in one Day, but it appears in the Chirograph Office, that the Proclamations were duly made, and he making and being the principal Officer, as to them, and the *Custos Brevium*, having only an Abstract thereof, upon the Prayer of the Defendant, a new *Certiorari* was directed to the Chirographer, who having certified the Proclamations duly made, *Trin. 26 Eliz.* between *Ray* and *Boaly*. 3 *Leon.* 106, 107. after Examination of the Clerks of the Common Pleas by the Justices in *B. R.* they awarded, that the Proclamations, with the *Custos Brevium* should be amended according to those in the Custody of the Chirographer.

11. If a Writ of Error be brought upon a Judgment in *B. R.* in *Ireland*, in a Writ of false Judgment upon a Judgment in the *Toulsel*, (which is the Court of the Mayor and Aldermen of *Dublin*) and it is assigned for Error, that there was no Plaint entered in the *Toulsel*, and that these Words *per quod*

quod actio accrevit were omitted in the Concluſion of the Declaration; if the Defendant alledges Diminution, yet he ſhall not have a *Certiorari* to the Chief Juſtice *de B. R.* in *Ireland*, to certify the Reſidue of the Record, *&c.* and that if any Part of the Record be not before him, that he ſhould write to the Mayor and Aldermen to certify it, and that he ſhould certify it to this Court; for by his Plea of *in nullo eſt erratum* in *B. R.* in *Ireland*, he hath admitted the Record well certified by the Mayor and Aldermen, and this Court hath no Authority to require the Court *de B. R.* in *Ireland*, to write to the Mayor, *&c.* and the Judgment *de B. R.* in *Ireland*, is only here in Queſtion. *Paſch.* 20 *Jac* between *Baniſter* and *Kennedy*. *Palm.* 285. ſuch Writ being iſſued a *Superſedeas* was granted to the Whole, tho' it was prayed that the *Superſedeas* ſhould be as to the inferior Court only. But at another Day it being moved, that there might be a *Certiorari* as to the Words *per quod*, *&c.* it was granted.

12. In a Writ of Error in the Exchequer-Chamber, upon a Judgment in *B. R.* it was aſſigned for Error, that in the Bill the Plaintiff declared on a Leaſe for 3 Years, but in the Plea-Roll upon which the Iſſue was joined, and the Record of *Niſi prius* it was upon a Leaſe for 5 Years, ſo that the Bill and Declaration vary, and Diminution being alledged by the Plaintiff, a Bill was certified, in which it was only for 3 Years, upon which the Defendant had another *Certiorari*, and thereupon a Bill was certified, wherein he declared upon a Leaſe for 5 Years, which warranted the Declaration upon the Roll and the *Niſi prius*. *Trin.* 1 *Car.* between *Howell*, *John* and *Thomas*, *Cro. Car.* 91. it was held by all the Juſtices and Barons, that the ſecond Certificate upon Diminution alledged by the Defendant ſhould be received; for that warranting the Roll and the Record of *Niſi prius*, ſhall be intended the true Bill, and the other a fictitious one.

Fol. 766.

(N) What Pleas a Party or Privy, and what Pleas a Tertenant ſhall plead.

Pleader.

1. IN a Writ of Error againſt him that recovers, the Defendant may plead, that (a) after a Recovery, he levied a Fine of the Land recovered to B. and that 5 Years are paſſed without Claim by the Plaintiff, for this Fine bars the Right by the Statute of 4 H. 7. and the Defendant may plead in Bar of the Right, tho' he be not Tenant of the Land. Tr. 12 Ja. B. R. between (b) Benfield and Batlamew.

(a) But that ſuch Fine levied before can be no Bar, tho' ſome of the Proclamations were made afterwards. Vide Holland & al' againſt Jackſon & al'. Bridg. 76. 1 Rol. Rep. 306. (b) Bartholomew and Belfield. Cro. Jac. 332. S. C. 2 Bulſt. 244, 245. S. C. adjudged. 1 Rol. Rep. 37. S. C. adjudged. 308. S. C. cited. 2 Jon. 183. S. C. cited, and vide March 195. 2 Inſt. 518. 2 Sid. 94, 95.

2. If a Writ of Error be brought againſt the Heir of him that recovers, tho' he hath nothing in the Land, yet he may plead the Releaſe of the Demandant of the Error. (c) 9 H. 6. 46. b. 48. per Curiam.

(c) Fitz. Error 20. S. C. Br. 9. S. C.

3. So he may plead that the Demandant is a Baſtard, where it is material. (d) 9 H. 6. 46. b. 49. Curia.

(d) Fitz. Error 20. S. C. Br. 9. S. C.

4. (a) So he may plead a Releaſe of the (b) Right in the Land, tho' he hath nothing in the Land. (c) 9 H. 6. 49.

(a) Co. Lit. 289. S. P. becauſe after ſuch Releaſe he cannot be reſtored to the Land. Co. Lit. 289. a. (b) Or of all Actions. 1 Rol. Rep. 209, 375. but where a Releaſe of all Actions, will be a Bar in Error. Vide Co. Lit. 288. b. (c) Fitz. Error 20. S. C. Br. 9. S. C.

5. In a Scire facias againſt a Tertenant, he may plead a Releaſe of the Error, though he be not privy to the Judgment. (d) 9 H. 6. 48. Curia.

(d) Fitz. Error 20. S. C. Br. 9. S. C.

6. In a Writ of Error againſt him that is privy, if the Judgment be reverſed; yet in a Scire facias againſt the Tertenant he may plead a Releaſe in Bar, or that the Demandant is a Baſtard. (e) 9 H. 6. 47.

(e) Fitz. Error 20. S. C. Br. 9. S. C.

7. The Tertenants cannot plead (f) in Abatement of the Writ of Error, but only in Bar, as a Releaſe, *&c.* in Maintenance of their Title. *Mich.* 14 *Car.* 2. between (g) *Win* and *Lloyd.* 1 *Lev.* 72. *per Cur'.*

(f) Where a Scire facias is awarded generally againſt the Tertenants without naming them, and ſeveral are returned warned and appear, one may plead Montenure to diſcharge himſelf, though not to abate the Writ as to the reſt, as might be done if all were named in the Writ, for which vide Holland & al' againſt Jackſon. Bridg. 72. 1 Rol. Rep. 301, &c. Cro. El. 739. Palm. 123, 227, 228. (g) 1 Keb. 351. S. C.

(O) At what Time.

1. IN a Writ of Error againſt the Heir of the Recoveror within Age, and a Scire facias againſt the Tertenant, if the Parol demurs for the Heir, and the Judgment is reverſed againſt the Tertenant, yet at full Age the Heir may plead the Releaſe of the Demandant of the Right, or of the Errors, and bar him. (h) 9 H. 6. 48. Curia.

(h) Fitz. Error 20. S. C. Br. 9. S. C.

2. In a Writ of Error againſt the Heir of the Recoveror, if a Scire facias be awarded againſt the Heir and Tertenant. (i)

(i) The Senſe here is left imperfect, as in the Original.

(P) What Thing ſhall be Error in Verdicts, or in (a) Proceedings after the Jury returned, and before Verdict.

(a) Where the Entry was, that juratores electi triati & jurati per Cur' for the Jury ought to be elected by the Sheriff. Stil. 29.

1. (b) If a Man be indicted for ſpeaking ſcandalous Words, &c. and upon Not guilty pleaded it is entered, that the Jury upon the Return of them appeared, & ſuper hoc Juratores præd' electi triati & ad veritatem de & ſuper premiſſis jurati dicunt ſuper Sacramentum ſuum quod, &c. and ſo give a Verdict; yet this is Error, becauſe it is not ſaid that they were jurati ad veritatem dicendam, according to the uſual Courſe, for they may be ſworn ad veritatem; yet in as much as they are not ſworn to give their Verdict according to the Truth, there is not any Command to give their Verdict according to Truth, and a Verdict is ſo called a Veredicto. Hill. 1650. (c) Williams's Caſe adjudged, and the Judgment given at the Seſſions at Newgate reverſed accordingly, for this Error; and then another Judgment was given accordingly in an Indictment of Perjury, ſhewed in a Caſe.

(b) 2 Lev. 83. like Point where the Words ad veritatem dicend' were omitted, and for that Cauſe the Judgment reverſed.

(c) Stil. 244. S. C. adjudged.

Fol. 767. (Q) What Thing ſhall be Error in (a) Verdicts.

(a) 1 Rol. Abr. 801. M. 1, 2, &c. Vid. alſo Verdict under Title Trial.

1. If A. brings an Ejectione firmæ againſt B. and C. and after Iſſue joined B. dies; and after upon an Habeas corpora which mentions the Iſſue to be between A. of the one Part, and the ſaid B. and C. a Verdict is given againſt B. and C. that they are guilty, and Damages are given againſt them, but a Surmiſe thereof is made before Judgment, and ſo Judgment given only againſt C. this is not erroneous, though the Verdict was againſt both, in as much as the Judgment was againſt him only that is living. Mich. 11 Car. B. R. between (b) Tiffin and Lenton adjudged in a Writ of Error upon a Judgment in B. and the firſt Judgment affirmed. Intratur Hill. 10 Car. Rot. 501. (c) 4 H. 7. 7. 3 H. 7. 6.

(b) Cro. Car. 426. S. C. adjudged. 1 Jon. 367. S. C. adjudged. 1 Rol. Abr. 756. p. 4. S. C.

Vide, and the Notes there.

(c) Fitz. Brief. 185. S. C.

2. In an Action upon the Caſe for ſeveral Words ſpoke at ſeveral Times; and upon Not guilty pleaded the Jury find for the Plaintiff, and give intire Damages; upon which a Verdict is given, if the Words ſpoke at one Day will bear an Action, and the Words ſpoke at another Day will not bear an Action, this is erroneous; (d) for it ſhall be intended the Damages were given for the Words ſpoke at both Times. Mich. 13 Car. B. R. between Alcock and Pargrave, per Curiam adjudged in Arreſt of Judgment.

(d) For this vide my 2d. Part, 458. pl. 2. and the Notes there. 798. 911.

3. But

3. But in an Action upon the Case for Words spoke at one Time, though Part of the Words are actionable and Part not, and the Jury find him guilty and tax Damages generally, (a) this is a good Verdict, for it shall be intended that they gave the Damages for those Words only which are actionable; this is the common Practise. Co. 10. (b) Osborn's Case.

(a) For this Vide my 2 Part, 457. pl. 1. and the Notes there. (b) 10 Co. 131. a.

4. In an (c) Action upon the Case upon a Promise, if the Plaintiff declares that the Defendant was indebted to him for Wares sold, scilicet, for such Wares so much, for such Wares so much, &c. in toto so much, &c. and (d) miscasts the total Sum (e) (putting more than the total Sum in truth) and thereupon assumed, &c. and the Defendant pleads the general Issue, and it is found for the Plaintiff, and Damages given and Judgment, this is Error, (f) because by Intendment the Jury gave Damages according to the total Sum put, and not according to the Particulars. Mich. 14 Car. B. R. between Milborne and Shaftoe adjudged, and Judgment given in Newcastle reversed accordingly. Intratur P. 14 Car. Rot. 325. and so adjudged, Pasch. 13 Car. B. R. between Kellet and Ashe in Arrest of Judgment.

(c) So in Debt where Damages were given for the intire Sum mis-cast. 2 Rol. Rep. 45. and vide Cro. El. 22. Yelv. 5. Noy 44, 45. —Diversity between Debt and Covenant, in which Damages only to be recovered. 3 Bulst. 156. (d) Vid. Hob. 89. Cro. Jac. 247, 498. 2 Rol. Rep. 54, 55. Cro. Jac. 569. 1 Bulst. 171, 180. 1 Rol. Rep. 335. 3 Bulst. 155, 156. Noy 88. (e) Where less. Cro. Jac. 569. (f) But if the Jury do not give more Damages than the Particulars amount to, it is not Error, Hunt and Hurlewood. 1 Lev. 58. 1 Keb. 238, 257. and vide Stile 161, 341.

5. But if the Miscasting be in a small Sum, as three Farthings more than is declared for in a great Sum, and this not certain, this shall not be so minced as to make Error. Hobart's Reports, (g) Lastlow and Tomlinson.

(g) Hob. fol 88. S. C.

6. (h) In Trover and Conversion for divers several Goods, if the Jury find him guilty for other Goods than those in the Declaration, and give Damages for all, and Judgment is given accordingly, this is Error. Pasch. 14 Car. B. R. between Griffith and Clark, adjudged in a Writ of Error upon a Judgment in Ireland, and this reversed accordingly. Intratur Mich. 13 Car. Rot. 205.

(h) 2 Rol. Rep. 415. l. p. in Tresp as for taking four Parcels of, &c. and the Jury as to five Parcels find him guilty, &c.

7. In Debt upon an Obligation, if the Defendant pleads non est factum, which is found for the Plaintiff, and the Jury assess Damages (i) occasione infra scripta, this is good, without saying occasione detentionis debiti for this is tantamount. Pasch. 8 Jac. B. (k) Alcock's Case, adjudged in Camera Scaccari in a Writ of Error.

(i) So where a Mount damna ex hac parte apposita. Poph. 193. (k) 1 Rol. Abr. 772. pl. 29. S. C.

8. In an Action upon the Case, if the Plaintiff declares for Slander of his Title to certain Lands, and also for speaking scandalous Words of his Person, and the Action is not well alledged as to the Slander of Title to the Land, (l) but well as to the Slander of the Person, and Not guilty is pleaded, and it is found for the Plaintiff and intire Damages given, this is Error; for it shall be intended that the Jury gave the Damages as well for the Slander of the Title of Land, as to the Person. Trin. 15 Car. B. R. between Nevill and Nevill per Curiam; this being moved in Arrest of Judgment.

Fol. 768.

(l) In such Cases intire Damages are given at the Peril of the Plaintiff, for if either Part fails, the Plaintiff cannot have Judgment. My 2 Part, 444. pl. 1, 2, 3. which vide, and the Notes there. 2 Rol. Abr. 99. E. 1. and the Notes there.

In

In Judgments.

(A) What Act or Thing ſhall be ſaid Error.

1. If the Husband ſeiſed in Right of his Wife, makes an Ejectment Leaſe, and the Leſſee brings an Action thereupon, and hath a Verdict, and Judgment, it is not Error to alledge the Death of the Feme before Judgment, by which the Intereſt of the Baron and Leaſe by him made to the Plaintiff determined, becauſe the Feme nor her Husband are not Parties to the Action, and this depends upon the Title of the Land, for the Plaintiff may ſay the Baron was ſeiſed in his own Right. Hobart's Reports, 8. between (a) Wilks and Jordan adjudged.

(a) Hob. Fol. 5. S. C. Cro. Jac. 332. S. C. but this Matter not aſſigned for Error, as in Hob. but upon Not guilty offered to be given in Evidence, and held, the Leaſe of the Husband was not determined, becauſe the Wife had not entered, and it was only voidable, not void.

2. If a Man brings an Ejectione firmæ in B. R. and there hath a Verdict for him, (b) upon a Trial at Bar, and after before Judgment he dies, and after Judgment is given for him the ſame Term, this is not Error, becauſe the Judgment relates to the Verdict. Mich. 15 Ja. between Hide and Marker, which concerned the Earl of Shrewsbury, per Curiam.

(b) So in Caſe of a Verdict at Niſi prius, and Plaintiff or Defendant dies after the Commencement of the Term following. Lit. Rep. 315. 1 Leon. 187. —where after the firſt Term Judgment may be entered, as of the Day in Bank, if no Continuances were before entered. 1 Lev. 252. 1 Vent 59. 1 Sid. 462. Vide Latch 92. Poph. 132.

3. (c) If a Verdict paſſes againſt the Plaintiff at Niſi prius, and after before the Day in Bank he dies, and after Judgment is given againſt him, this is Error in as much as Judgment was given againſt a dead Perſon. Tr. 12 Ja. B. R. (d) Jurdan's Caſe adjudged.

(c) 1 Sid. 143. S. P. per Cur'. —But vide 17 Car. 2. cap. 8. (which was continued by 30 Car. 2. and made perpetual by 1 Jac. cap. 7.) by which it is enacted, that in all Actions real, perſonal or mixt, the Death of either Party between the Verdict and Judgment, ſhall not be alledged for Error, ſo as ſuch Judgment be entered within two Terms after the Verdict.—A Signing within two Terms, though not entered upon the Roll till after, hath been held within the Act; for upon ſigning, Execution may be taken out, which ſhews the Judgment is compleat. 1 Sid. 385. per Cur'. (d) 1 Rol. Rep. 51. S. C. adjudged.

4. If the Tenant in a real Action dies, pending the Writ, and after Judgment is given againſt him, this is Error, becauſe it is given againſt a dead Perſon. (e) 28 Aſſ. 17. adjudged.

(e) Br. Error 123. S. C.

5. In an Action againſt Baron and Feme, if the Feme be received and traverſes the Action, and this is found againſt her by Niſi prius, and after the Baron dies before the Day in Bank, at which Day the (f) Judgment is given, this is Error, becauſe the Judgment is given againſt a dead Perſon. (g) 27 E. 3. 89.

(f) After a Verdict in Ejectment againſt Baron and Feme at Niſi prius, the Baron died before the Day in Bank, and Judgment was entered againſt the Feme alone. Rigly and Lee. Cro. Jac. 356. 1 Rol. Rep. 14. and vide Cro. Car. 509. Hob. 129. Hardr. 152. (g) Fitz. 193. S. C.

6. In an (h) Assumpsit against two, after a Verdict against them at the Assizes by Nisi prius, if one of the Defendants dies (i) before the Day in Bank, and after Judgment is given against both according to the Verdict, this is erroneous, though the Day of Nisi prius and Day in Bank are one Day as to some Purposes, for the Judgment was given against a dead Person. Pasch 22 El B. R. dubitatur, between (k) Brady and Eastwigg. Pasch. 12 Jac. B R. between (l) Lee and Rewkely per Curiam.

(h) Vide 1 Rol. Abr. 756. pl. 4. and the Notes there.

(i) Where a Release after the Nisi prius and before the Day in Bank, is not pleadable. My 1 Part, 652. pl. 8. vide and the Notes there. (k) Cro. El. 202. S. C. and though the Court was informed of the Death of one of the Defendants, yet they regarded not such Information, but gave Judgment. Vide Latch 92. 1 Mod. 5.——Yet where upon an Affidavit Judgment hath been staid in such Case, vide 1 Sid. 131. Hob. 129. (l) 1 Rol. Rep. 14. S. C. but S. P. does not appear. Cro. Jac. 356. seems to be S. C. but S. P. does not appear.

7. If a Judgment be given against three Executors, where one was dead before the Judgment, yet this is not Error. Hill. 41 El. B. R. adjudged in a Writ of Error.

In Judgments.

Fol. 769.

(B) What Things shall be Errors in Judgments.

1. In an Indictment for not repairing a common Highway, if the Defendants are found guilty, and a Fine imposed & quod sint in Misericordia (a) without a capiatur, this is Error. Hill. 10 Car. B. R. between the Inhabitants of Somersham, in Comitatu Huntington, and the King adjudged; and the first Judgment reversed accordingly.

(a) Upon every Conviction upon an Indictment, there ought to be a Capiatur, or it is Error, the King and Lord St. John. 1 Jon. 407. Cro. Car. 504, 505. adjudged upon an Indictment upon the Statute for Recusancy, though the Defendant forfeited 20 l. per Month.

2. If the Judgment be quod the Plaintiff or Defendant capiatur, (b) where it should not be, this is Error, for it is a false Judgment, and in Prejudice of the Party. Tr. 15 Ja. between (c) Wheately and Stone, per totam Curiam in a Writ of Error at Serjeant's Inn agreed. Dyer 14 El. 315. 99. admit.

(b) In what Cases the Judgment shall be quod capiatur. Vide my first Part, 475, 477. (c) Hob. fol. 180. S. C.

3. So if the Plaintiff or Defendant be amerced by the Judgment (d) where he ought not, this is Error. Dyer 14 El. 315. 99. admit. 6 E. 6. 75, 22.

(d) Where he ought or ought not to be amerced. Vide my first Part, Title Amerciament.

4. So if the Judgment be not quod capiatur where it ought to be so it is erroneous. Mich. 16 Car. B. R. Fridean's Case, who was indicted for poisoning J. S. but he did not die, and found guilty; and Judgment to pay so much for a Fine, and no Capiatur quousque, &c. and for this Cause reversed, per Curiam; contra 29 E. 3. 30. b. adjudged.

5. (a) So if the Judgment be not quod ſit in Miſericordia, where it ought to be ſo, it is erroneous. Co. (b) 8. Beecher's Caſe 49. reſolved, becauſe the Judgment is not perfect without it. Dyer 14 El. 315. 59. admit. 6 E. 6. 75, 22.

(a) Where the want of the one or the other, or the giving Judgment for the one in Lieu of the other, is Error. Vide Cro. El. 781, 699. 1 Rol. Rep. 293, 400. Cro. Car. 32. 330. 1 Sid. 232. Raym. 195, 202, 390. 2 Sand. 47. 1 Bulſt. 179. 2 Bulſt. 133. and many other Caſes which may be found under Title Amerciament in my firſt Part. —But by the Statute of 16 & 17 Car. 2. cap. 8. no Judgment after Verdict, Confeſſion by cognovit actionem, or relicta verificatione, ſhall be reverſed for want of a Miſericordia or Capiatur, or becauſe one is entered for the other; unleſs in Appeals, Indictments, &c. and Vide 4 & 5 Ann. by which all the Statutes of Jeofails are extended to Judgments by Confeſſion, nil dicit, or non ſum informatus. (b) Cro. Jac. 211. S. C. adjudged.

6. In an Ejectione firmæ, if Judgment be given upon Demurrer, or by Default, or upon a non ſum informatus for the Plaintiff to recover the Term, but awarded that there ſhall be a Writ of Inquiry of Damages, without ſaying quod capiatur, this is erroneous, for it may be that he will never inquire of the Damages, or make Return thereof, and then the Fine due upon the Capiatur will be loſt. (c) Tr. 1651. between in a Writ of Error upon a Judgment in Banco, and the Judgment reverſed accordingly.

(c) Giles and Timberly, Stile 283. ſeems to be S. C.

7. If the Judgment be quod capiatur, where it ought to be quod ſit in Miſericordia, this is erroneous, for by this the Judgment is altered, and this is in Prejudice of the Party. Tr. 15 Ja. between (d) Whetely and Stone, in a Writ of Error at Serjeant's Inn agreed per totam Curiam.

(d) Hob. 180. S. C.

8. So if the Judgment be quod ſit in Miſericordia, where it ought to be quod capiatur, this is erroneous for the Cauſe aforeſaid. Co. 8. (e) Beecher 59. P. 3 Ja. B. R. 3. between Rivers and Guynn adjudged, and the firſt Judgment reverſed. P. 41 El. B. R. Tr. 14 Car. B. R. between Margatrode and Beverly, adjudged in a Writ of Error. Intratur P. 14. Rot. 168.

(e) Cro. Jac. 211. S. C. adjudged.

9. If the Judgment be quod ſit in Miſericordia & quod Capiatur, where it ought to be only in Miſericordia, this is Error. Mich. 8 Car. B. R. Intratur. Tr. 8 Car. Rot. 477. between Kent and Fowkes reſolved, and ſuch Judgment given in Lincoln reverſed.

10. And in theſe Caſes the Error is in the whole Judgment, and the Whole ſhall be reverſed for it, as well the Judgment of the Party as for the King. Co. 8. Beecher 59. reſolved. Tr. 15 Ja. between (f) Whetely and Stone, in a Writ of Error at Serjeants Inn agreed per totam Curiam, Quære Dyer 14 El. 315.

(f) Cro. Jac. 211. S. C.

11. In an Information againſt an Ingroſſer, upon the Statute of 5 Ed. 6. if the Judgment be againſt the Ingroſſer quod capiatur, &c. without expreſſing in certain, that he ſhall be impriſoned for the Time limited in the Statute, ſcilicet, per two Months, yet this is not Error in the Judgment, for this is the common (*) Courſe, of ſuch Judgments where a certain Time is limited for the Impriſonment, for the Word, &c. ſupplies all. Tr. 16 Ja. between the King and Curtis, H. 15 Ja. B. R. between Brown and Marſhal adjudged, and it was ſaid by the Clerks, that this is the common Courſe.

(*) Fol. 770.

12. In Debt upon an Obligation, if upon non eſt factum pleaded it is found, his Deed upon which Judgment is given quod Defendant ſit in Miſericordia & quod capiatur, this double Judgment is erroneous, and this makes the whole Judgment erroneous. P. 3 Ja. B. R. between Banks and Pembleton adjudged in a Writ of Error. Mich. 8 Car. B. R. between Kent and Fowkes adjudged, and a Judgment given in Lincoln in an Action upon the Caſe, where the Judgment ſhould be quod capiatur reverſed accordingly. Intratur Tr. 8. Rot. 477.

13. In an Action upon the Caſe upon a Promiſe, if Judgment be given for the Plaintiff upon Demurrer, and a Writ of Damages awarded, and thereupon Damages taxed to 35 l. and upon this Judgment

ment is given quod querens recuperet damna præd' ad 37 l. per Juratores præd' assessa, yet this Judgment is not erroneous, because the Judgment is perfect by the first Words quod recuperet damna prædicta, without more, and therefore the Summing thereof afterwards is but Surplus, and therefore this being mistaken it does not vitiate the Judgment. H. 3 Car. B. R. between (a) Guier and Goter, adjudged in a Writ of Error upon a Judgment in the City of Pool in Southampton; which Intratur M. 2. Car. Rot. 247. (a) Palm. 509, 510. S. C. and Judgment affirmed nisi.

14. In an Action of Debt, if the Defendant pleads nil debet, and the Jury find it for the plaintiff, and tax Damages to 12 d. and for Costs 12 d. and thereupon Judgment is given quod querens recuperet debitum suum præd' & debita sua præd' (in the Lieu of damna) this is erroneous, for the Word debita does not include damna. Mich. 11 Car. B. R. between Morgan and Bayly adjudged per Curiam, and such Judgment given in Southwark reversed accordingly in a Writ of Error. Intratur Tr. 9 Car. Rot. 895.

15. In Debt, if Judgment be given for the Plaintiff by Default of the Defendant, and the Judgment is quod recuperet debitum & damna occasione detentionis debiti ad 13 s. 4 d. ex assensu suo per Curiam de incremento adjudicat' this is a good Judgment, though no mention of the Costs, for Damages include Costs. Mich. 11 Car. B. R. between Pierce and Brown, adjudged in a Writ of Error to reverse a Judgment given in the Hundred Court of Slaughter. Intratur P. 10 Car. Rot. 1335. but it was said also in this Case, that the Defendant shall not assign for Error the not giving of Costs, because it was for his Advantage.

16. In an Action upon the Case upon a Promise, if the Defendant pleads non assumpsit, and the Jury find for the Plaintiff, and tax Damages and Costs; and upon this Judgment is given quod querens recuperet damna & Custagia per Juratores præd' assessa & 40 s. de incremento per Curiam, and does not say whether for Damages or Costs, yet this is good, for it shall be intended for Costs, because the Court could not increase the Damages. Tr. 11 Car. B. R. between Cooling and Lawrence, adjudged in a Writ of Error upon a Judgment in the Court of Coventry. Intratur Tr. 10 Car. Rot. 1328. Co. Entries, 22. Snag's Case.

17. In an Action of Debt, if upon Nil debet pleaded it be found, that the Defendant owes the Plaintiff 5 l. Debt, and the Jury assess the Damages to 2 d. and the Costs 2 d. and the Judgment is entered, that the Plaintiff shall recover debitum & damna præd' to 2 d. and says nothing of the Costs, the Judgment is erroneous, though the Damna generally comprehends as well Costs as Damages; for in this Case it is limited but to 2 d. and so no Judgment for the other 2 d. Mich. 15 Ja. B. R. between Homes and Twiste adjudged in a Writ of Error, and the Judgment reversed.

18. In a Trover and Conversion of Goods, if the Defendant be found Guilty of Part, and for Part Not guilty, but no Judgment is given for those of which he is found Not guilty, scilicet quod eat inde sine die, as it ought to be, this is erroneous. Hill. 13 Jac. B. R. between (b) Wood and Dr. Sutcliff per Curiam. Fol. 771. (b) Cro. Jac. 439, 440. S. C. adjudged.

1 Roll. Rep. 294. S. C. adjudged. 3 Bulst. 151, S. C. infra pl. 20. S. C.

19. If

19. If a Man recovers Debt or (a) Damages upon a Verdict, and Judgment is given thereof, and 2 s. de incremento generally, without saying in the Record as the Use is ex requisitione querentis or ex assensu partium, this Judgment is erroneous. Pasch. 15 Jac. B. R. Hardye and Mayhew; the Judgment reversed for this. Mich. 15 Jac. B. R. between Far and Loggins per Curiam; the Judgment reversed, which intratur Mich. 12 Car. Rot. 259. Mich. 18 Jac. B. R. between (b) Sarhe and Yeomans adjudged in a Writ of Error, and so the same Term adjuged between (c) Conceller and Aier, and no Diversity where the Judgment is upon nil dicit, and where upon Verdict. Hi. 2 Car. B. R. between (d) Lawrence and Gad, adjudged an erroneous Judgment, which was ideo ad petitionem querentis consideratum est quod querens recuperet, &c. & damna de incremento, so much because the Petition was not in the right Place.

(a) Where Damages shall be assessed by the Court ad requisitionem quer' not else. vide Hy 2d. Part 449. pl. 5.

(b) Cro. Jac. 587. S. C. adjudged.

(c) Cro. Jac. 587. S. C. adjudged. Conflate and Ayres. Palm. 148. S. C. adjudged.

(d) Good's Case. Poph. 211, 212. seems to be S. C. Lat. 177. S. C.

20. In a Trover and Conversion, if the Defendant be found Guilty of Part, and Not guilty of the Rest, upon which Judgment is given for that for which he is found Guilty, and no Judgment is given quod eat inde sine die for the Residue, it is erroneous. Mi. 15 Jac. B. R. between (d) Wood and Sutcliffe, this was moved for an Error, but not resolved, but the Judgment reversed for other Error.

(d) Supra pl. 18. S. C. which vide, and the Notes there.

21. If a Man recovers in an Action upon the Case, and the Judgment is entered ideo concessum est quod querens recuperet, where the usual Word is ideo consideratum est, &c. this is erroneous, though concessum be equivalent to the Word Consideratum, (e) because the usual Form ought to be observed. Mich. 13 Jac. B. R. 42. between (f) Robins and Sambin, Dubitatur, Hill. 11 Car. B. R. between (g) Dalamore and Heskins, adjudged in a Writ of Error, and the Judgment given at Bath reversed accordingly. Intratur Tr. 11 Car. Rot. 900.

(e) Videtur, liquet, concessum not proper Words. Yel. 130. Bulst. 125, 126.

(f) 1 Roll. Rep. 278. S. C. Cro. Jac. 386. S. C. and said that diverse Precedents in my Lord Coke which were cited, were misprinted; but vide Hob. 17, 19, 194. such Precedents. 3 Bulst. 92, 93. Agreed per totam Cur', upon a Writ of Error upon a Judgment in an inferior Court, though Judgment was not then reversed, but Time given to search Precedents, and it was never moved again. (g) Slocomb's Case. Cro. Car. 442. seems to be S. C. adjudged

22. If the Judgment be ideo consideratum, concessum & adjudicatum est quod querens recuperet, &c. though the Words concessum & adjudicatum are more and more than necessary, yet this makes the Judgment erroneous, because the Form of Judgments ought to be observed, which is consideratum only. Hill. 2 Car. B. R. between (h) Laurence and Gad adjudged in a Writ of Error. Pasch. 8 Car. B. R. Rot. Baunsy's Case, a Judgment in an Indictment of Barretry. reversed because the Judgment was ideo concessum est quod, &c. adjudged, and said if they were not tied to Form, there would be no End of new and senseless Words; & vide, 1 Roll. Rep. 278. 1 Bulst. 179. 3 Bulst. 93. Pop. 211, 212. Lat. 83, 188.

(h) Good's Case. Poph. 211, 212. seems to be S. C. adjudged, Lat. 77.

23. If the Judgment be ideo consideratum est quod querens recuperet, for recuperet this is erroneous. Trin. 3 Car. between (i) Strowd and Blundel, adjudged in B. R. in a Writ of Error upon a Judgment given in Basingstoke in Hampshire. Mich. 14 Car. between Picekill and Rotherford, adjudged in a Writ upon a Judgment in Newcastle. Intratur Hill. 13 Rot. 1093.

(i) Lat. 211. S. C. adjudged.

24. (k) If a Judgment be ideo consideratum fuit for consideratum est, it is erroneous. Trin. 3 Car. B. R. between adjudged in a Writ of Error upon a Judgment given in Lincoln.

(k) Stile 183. S. P.

25. If an Action of Debt be brought against two by one Original, with several Precipes upon one Obligation in which they are obliged jointly and severally, and several Declarations are made against them, and several Judgments given, but these Words are not put in the Judgment, as the Use is scilicet (unica tantum fiat Executio) yet the

Judgment is not erroneous, because these Words are used to be entered for the Direction of the (*) Clerks, and are of Form only, for tho' the Words are not entered, yet he shall have but one Execution. Trin. 12 Jac. B. R. between (a) Banks and Chamberlain adjudged. (*) Fol. 772.

(a) 1 Roll. Rep. 44. S. C. adjudged.

26. In an Ejectione firmæ, if the Defendant be found Guilty for Part and for Part Not guilty, the Judgment is quod Defendant sit quietus, this is erroneous, for it ought to be quod eat inde sine die. Trin. 12 Jac. between (b) William Morris and Cadwallader, dubitatur.

(b) 1 Roll. Rep. 51. S. C. dubitatur, and Precedents ordered to be searched.

27. In a Quare Impedit against the Ordinary, Metropolitan and others, if the Ordinary and Metropolitan plead that they claim nothing but as Ordinary, upon which the Plaintiff prays Judgment against them, and Judgment is entered that he shall recover against them; but it is not also entered quod cessет Executio, till the Plea of the others is determined as the usual Course is; yet if no Execution be awarded till the Plea of the others is determined, it is not erroneous. Pasch. 14 Jac. B. R. Trin. 14 Jac. B. R. between (c) Grange and Denny adjudged in a Writ of Error.

(c) 1 Roll. Rep. 367, 397. S. C. adjudged. S. C. adjudged. 3 Bulst. 174, 175, &c.

28. In an Action of Debt in Banco, if Judgment be quod querens recuperet debitum, and so much pro damnis occasione detentionis, tho' it be not necnon pro misis & custagiis as the Use in Banco Regis, yet it is good, for this is the Use in Banco. Mich. 22 Jac. B. R. between (d) Broad and Nurse adjudged in a Writ of Error.

(d) 2 Roll. Rep. 470.

S. C. and a Difference taken where the Plaintiff hath a Verdict for him, there the Judgment is quod recuperet debitum & damna, and Costs assessed by the Jury; and farther, de incremento per Curiam, but where the Judgment is upon non sum informatus, Demurrer, or nil dicit, the Judgment is quod recuperet debitum & damna, which includes Costs; but in the last Case in B. R. the Entry is more special, viz. tam occasione detentionis, &c. quam pro misis & custagiis.

29. In Debt upon an Obligation, the Defendant pleads non est factum, which is found for the Plaintiff, and the Jury assess Damages occasione infrascripta, this is good, without saying occasione detentionis debiti, for this is tantamount. Pasch. 8 Jac. B. R. (e) Alcock's Case adjudged in Camera Scaccarrii in a Writ of Error.

(e) 1 Roll. Abr. 767. pl. 7. S. C. which vide and the Notes there.

30. In Ejectione firmæ, if upon non sum informatus pleaded, Judgment be given quod Def. remaneat indefensus, without saying against the Plaintiff, it is good. Pasch. 12 Jac. B. R. between Friget and Mallory per Curiam.

31. In an Action if the Defendant pleads in Bar, upon which there is a Demurrer, and Judgment is entered in this Manner, quia videtur to the said A. and B. scilicet the Mayor and Recorder (who were the Judges of the Court) Justiciariis Dom. Regis that the Plea is not good, ideo consideratum est, &c. this is good, because the Naming them Justices is but Surplus. Hill. 8 Car. B. R. between Greenhill and King, adjudged in a Writ of Error upon a Judgment in Linn. Intratur Trin. 7 Rot. 1572.

32. If the Judgment be entered in an inferior Court held before the Steward, ideo consideratum est per Seneschallum quod querens recuperet, this is good, for this is all one as if it had been said ideo consideratum est per Curiam. Trin. 14 Car. B. R. between Stretch and Parker, adjudged in a Writ of Error. Intratur Mich. 13 Car. Rot. 21. in a Writ of Error out of Alcester Court. Trin. 13 Car. B. R. between

tween Mill and Maurie, adjudged good in a Writ of Error upon a Judgment in Exeter, where it was ideo consideratum est (a) ad eandem Curiam by the Mayor and Bailiffs (who were the Juges) quod querens recuperet, and did not say per Curiam. Mich. 15 Car. B. R. between Mapowder and Lippingcot, it was adjudged in a Writ of Error there. Intratur Pasch. 15 Car. 795. Mich. 23 Car. B. R. between Robinson and Barns, adjudged upon a Judgment in Exeter.

(a) Stil. 182, 183. S. P. 194. S. P.

33. (b) But if it be ideo consideratum est, and it is not said per Cur' nec per Seneschallum, this is erroneous in other Judgments. Mich. 14 Car. B. R. between Brown and Clag, adjudged in a Writ of Error, and the Judgment given in the new Court of Marshalsea reversed accordingly. Intratur Pasch. 14 Car. Rot. 325. Trin. 15 Car. B. R. between (c) Moon and Axe, adjudged in a Writ of Error upon a Judgment in Exeter. Intratur Mich. 14 Car. Rot. 213. Trin. 14 Car. B. R. (*) between Cook and Lewis, adjudged in a Writ of Error upon a Judgment in Wenlock Court, and this reversed accordingly. Intratur Trin. 13 Car. Rot. 542. Mich. 14 Car. B. R. between Guy and Cannon, adjudged in a Writ of Error upon a Judgment in the Marshalsea, and this reversed accordingly. Intratur Hill. 13. Rot. 824.

(b) March 7. S. P. adjudged, but it does not appear in what Court the first Judgment was given. Stile 430. S. P. per Roll Ch. Ju. 1 Sid. 143, 147. S. P.

(*) Fol. 773.

(c) Mead and Axe. March 15, 16. S. C. adjudged, but it does not appear there in what Court the first Judgment was given.

agreed upon a Judgment in an inferior Court, & vide 1 Sand. 74

34. In an Action upon the Case, upon a Promise and Verdict for the Plaintiff and Damages and Costs given, and the Judgment is quod querens recuperet damna sua præd' ad 6 l. per Juratores prædictos in forma prædicta assessa, and the Damages and Costs are mistaken, not amounting to so much; yet this is not erroneous, for this is only a Miscasting, and damna præd' intends only those which were assessed, and so the Judgment is not for more. Trin. 15 Car. B. R. between Moorecock and Hooles per Curiam adjudged good, and the first Judgment affirmed accordingly in a Writ of Error. Intratur Pasch. 15 Car. Rot. 416.

35. (d) If a Judgment be give (e) in Banco, ideo consideratum est quod querens or Defendens recuperet, &c. and it is not consideratum est per Curiam, yet this is good, for this is the Use de Banco & de B. R. Mich. 14 Car. B. R. between Elvyn and Prime, adjudged in a Writ of Error. Intratur Pasch. 14 Rot. 134.

(d) 1 Sid. 143. S. P. per Curiam.

(e) So if given in Durham, or other Counties Palatine, Smith ver. Smith. 1 Lev. 105. adjudged. 1 Sid. 147. adjudged, and vide 1 Sand. 74. —Otherwise in the grand Franchise of Ely. 1 Lev. 105.

36. If a Judgment in Banco be ob quod consideratum est, where it should be ideo consideratum est by the usual Course, yet this is good in Banco, for this is all one in Effect. Mich. 15 Car. B. R. between Drury and Young, adjudged in a Writ of Error. Intratur Trin. 15 Car. Rot. 46.

37. In an Action upon the Case, upon a Promise, if the Defendant Nihil dicit per quod, the Judgment is to be given by Nihil dicit, and the Judgment is entered quod querens recuperet damna sua, sed quia nescitur quæ damna, &c. a Writ of Inquiry is awarded where the usual Course of Entry is quod querens recuperare debeat damna, &c. and not recuperet, yet this is good in Banco, for it is all one in Effect. Mich. 15 Car. B. R. between Drury and Young, adjudged in a Writ of Error. Intratur Trin. 15 Car. Rot. 46.

Judgment.

(C) (a) What Judgment ſhall be given upon the Reverſal.

(a) Caſes in Parl. 57. vid. 1 Roll. Abr. 805. pl. 1, 2. &c.

1. If the Defendant pleads in Abatement of the Writ, and this is awarded a good Plea, by which the Writ abates, if the Judgment is reverſed, becauſe this was not a good Plea, the (b) Plaintiff ſhall be reſtored to his Original, and ſhall not be entered to a new Original. (c) 9 H. 6. 38. b.

(b) They ſhall proceed upon that Writ in the King's Bench, as the Judges of the Common Pleas ſhould have done. 2 Inſt. 23. 4 Inſt. 72. (c) Br. Error. 7. S. C.

2. If an erroneous Judgment be given upon the Proceſs againſt the Demandant, and it is after reverſed for Error in the Proceſs, the Demandant ſhall be reſtored to his Original, and the Tenant ſhall anſwer to it. 21 Aſſ. Placito 17.

3. If an inſufficient Plea in Bar be adjudged a good Plea, and the Judgment after reverſed for this Cauſe, by Writ of Error (d) the Demandant ſhall not be reſtored to the ſame Original. (e) 9 H. (f) 9. 38. b.

(d) Where upon ſuch Plea in Debt, and Error brought, the Plaintiff had Judgment to recover his Debt and Damages. Vide 1 Leon. 33. (e) Br. Error. 7. S. C. (f) This is miſprinted here as in the Original, and ſhould be. 6.

4. But in this Caſe he ſhall be reſtored to his Action. (g) 9 H. 6. 38. b.

(g) Br. Error 7. S. C.

5. In an Aſſiſe by an Infant, if the Tenant pleads in Bar upon which the Aſſiſe is awarded at large to inquire of the Circumſtance, becauſe the Plaintiff is an Infant, and the Inqueſt find for the Plaintiff without inquiring of the Matters alledged in the Bar, by which the Plaintiff hath Judgment, and it is reverſed in a Writ of Error; the Plaintiff at his Election ſhall be reſtored to his Original, and ſo attach the Tenant thereupon. (h) 31 Aſſ. 22. adjudged.

(h) Br. Error 126. S. C.

6. And the Judgment ſhall be that he ſhall have a new Original at his Election. (i) 31 Aſſ. 22. adjudged.

(i) Br. Error 126. S. C.

Fol. 774.

7. If the Tenant in an Action makes Default, and an Eſſoin is caſt for him, which does not lie, and notwithſtanding upon Challenge thereof by the Demandant, and Prayer by him of Seiſin of the Land upon the Default, Judgment is given againſt the Demandant, for not counting that he ſhall take nothing by his Writ, if he brings a Writ of Error and it is reverſed, for this Cauſe the Judgment ſhall be, that he ſhall recover Seiſin of the Land upon the Default, becauſe the inferior Court ought to have given this Judgment. 21 E. 3. 46. 62. 21 Aſſ. Placito 17. adjudged.

8. (k) If in a Writ of Right Cloſe in ancient Demeſne, the Demandant makes his Proteſtation to ſue in Nature of a *Mortdanceſter*, and the Tenant pleads in Abatement, and Judgment is given for him; and after upon falſe Judgment brought, the Writ is affirmed good, the Court of Common Pleas ſhall proceed as the inferior Court ſhould have done. 4 *Inſt.* 270.

(k) F. N. B. 19. D. S. P. and the Method of Proceeding in ſuch Caſe.

(D) How Judgment ſhall be given upon the Reverſal of the firſt Judgment.

1. IN an Action upon the Caſe, if the Plaintiff being Delamore, declares that whereas there was a Suit in Bath between the Defendant and S. and Iſſue thereupon was joined, and at the Trial thereof in Aula there the Plaintiff was ſworn as a Witneſs, and ſhewed his Oath, and after the Defendant having Communication with the Wife of S. of the ſaid Trial and Oath, ſaid theſe Words of the Plaintiff your Brother Delamore (innuendo the Plaintiff exiſtentem fratrem of the ſaid Wife) took a falſe Oath againſt me in the Hall (innuendo, &c.) I would not take ſuch an Oath for all the World; after Not guilty pleaded, and a Verdict for the Plaintiff, yet Judgment being there given againſt the Plaintiff quod nihil capiat, &c. becauſe the Declaration is not good, becauſe it is not averred that the Plaintiff was Brother to the ſaid Wife of S. to whom the Words were ſpoken, but only in the innuendo which is not ſufficient: Though this Judgment given there be reverſed in Banco Regis in a Writ of Error, for the Inſufficiency in the Judgment, this being ideo conceſſum eſt, for conſideratum eſt, yet the Court de B. R. ought to give the ſame Judgment which ought to have been given at Bath, ſcilicet quod querens nil capiat per Billam. Hill. 11 Car. B. R. between (a) Delamore and Heskins adjudged. Intratur Trin. 10 Car. Rot 900.

(a) Cro. Car. 442. Slocomb. S. C. and Judgment given accordingly. 1 Vent. 28. S. C. cited.

2. In an Action upon the Caſe for Words, if Judgment be given againſt the Plaintiff that the Words are not actionable, upon which the Plaintiff brings a Writ of Error, and thereupon the firſt Judgment is reverſed becauſe the Words are actionable: the Court after Reverſal of the firſt Judgment, ought to give Judgment that the Plaintiff ſhall recover, for this Court ought to give the ſame Judgment that the firſt Court might have done. Mich. 14 Car. B. R. between (b) Hekins and Chele adjudged. Intratur Hill. 13 Car. Rot. 696.

(b) Cro. Car. 509. S. C. and Judgment given accordingly.

3. In an Ejectione firmæ, upon Not guilty pleaded, Iſſue is joined and a ſpecial Verdict found, and upon this Verdict Judgment given againſt the Plaintiff; and after the Plaintiff brings a Writ of Error, and in this the Judgment is reverſed, the Plaintiff ſhall have Judgment and recover his Term, his Declaration being good, and the Law being for him upon the ſpecial Verdict; (c) for the Court that reverſes the firſt Judgment, ought to give the ſame Judgment which ought to have been given in the firſt Suit. Mich. 14 Car. B. R. between (d) Omulconrie and Ayres, adjudged in a Writ of Error upon a Judgment in Ireland. Intratur Mich. 13 Car. Rot. 332.

(c) Judgment reverſed in Parliament, and a new Judgment given. Caſes in Parl. 57.

(d) Cro. Car. 512. S. C. and Judgment given accordingly. 2 Sand. 256. S. C. cited.

I

4. In

4. In Treſpaſs brought in *B. R.* Judgment was given for the Defendant upon his Demurrer to the Plaintiff's Replication, and he brought Error in the Exchequer-chamber, and this Judgment was reverſed, and Judgment given *quod recuperet*; and after, the Record being remanded, a Writ of Inquiry of Damages was awarded, and upon the Return thereof Judgment given that the Plaintiff ſhould recover the Damages found; for though the Stat. of 27 *El.* mentions (a) only the Returning of the Record, and that Execution ſhall be done, yet it muſt be intended that all ſhall be done that is neceſſary in Order thereto. *Paſch.* 6 *Jac.* between (b) *Faldoe* and *Rudge*, *Cro. Jac.* 206. adjudged.

(a) Vide the Words of Stat. 27 El. cap. 8. By which, after the Record is brought back, ſuch further Proceedings may be thereupon had, as well for Execution as otherwiſe.

(b) Noy 129. S. C. adjudged, Yelv. 74, 76. S. C. adjudged.

5. If in an Action of Waſte in the Huſtings in *London*, Judgment is given for the Defendant, and after, upon a Writ of Error brought before Commiſſioners in St. *Martins*, according to the Cuſtom of the City, that Judgment is reverſed; the Commiſſioners ſhall give the ſame Judgment as before ought to have been given, for the Cuſtom of Proceeding in *London* ſhall be intended according to the Common Law, if no Precedent appear to the Contrary. *Hill.* 22 & 23 *Car.* 2. between (c) *Cole* and *Green.* 1 *Lev* 310. adjudged, and that Judgment after affirmed in Parliament.

(c) 2 Sand. 256. S. C. adjudged, and afterwards affirmed in Parliament.

6. In Replevin, in *B.* the Defendant pleaded a Leaſe made 1 *Oct. &c.* and avowed for Rent reſerved thereupon, and the Plaintiff, in Bar thereof, pleaded *non demiſit* 1 *Oct. &c. modo & forma*, upon which Iſſue being joined, it was found for the Plaintiff, and Judgment for him, and the Defendant brought Error in *B. R. Tr.* 23 *Car.* 2. between (d) *Holbeach* and *Bennet.* 2 *Lev.* 11, 12. and it was agreed to be an immaterial Iſſue, and the Judgment erroneous; and yet that the Court could not award a Repleader, as the Common Pleas might have done, (and as the ancient Uſuage was, but diſuſed for one Hundred Years) and there being groſs Faults in the Avowry, it was ſaid that if they reverſed the Judgment, perhaps they muſt give Judgment upon the Declaration, for the Faults in the Avowry, & *adjornatur.*

(d) 2 Sand. 317, 319. S. C. and S. P. as to the Repleader agreed, but Hales contra Twiſden held the Iſſue was aided by the Statute of Jeofails, and ſaid the Judgment could not be reverſed for the Faults in the Avowry, and the Judgment was affirmed.

(E) In what (a) Caſes the whole Judgment ſhall be reverſed, or but Part.

(a) Vide Moor 366. Noy 117. 2 Leon. 178. Cro. El. 425. 2 Sid. 57, 94. Fol. 775. 2 Roll. Rep. 136, 137. 1 Sid. 357. 2 Jones 374.

1. IN a Formedon de uno Croſto Meſſuage, &c. if the Demandant recovers, and in a Writ of Error it is adjudged that a Formedon does not lie of a Croft, the Judgment for the Reſidue ſhall be reverſed alſo, becauſe the Writ is not good, in as much as there cannot be a good Judgment upon a bad Writ. (b) Pach. 12 Jac. B. R. adjudged.

(b) 1 Roll. Rep. 2. S. C. Ellis and Wallis. 2 Bulſt. 214. S. C. adjudged. Allen 74. S. C. cited.

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3. In an Ejectione firmæ, upon Not guilty pleaded, Iſſue is joined and a ſpecial Verdict found, and upon this Verdict Judgment given againſt the Plaintiff; and after the Plaintiff brings a Writ of Error, and in this the Judgment is reverſed, the Plaintiff ſhall have Judgment and recover his Term, his Declaration being good, and the Law being for him upon the ſpecial Verdict; (c) for the Court that reverſes the firſt Judgment, ought to give the ſame Judgment which ought to have been given in the firſt Suit. Mich. 14 Car. B. R. between (d) Omulconrie and Ayres, adjudged in a Writ of Error upon a Judgment in Ireland. Intratur Mich. 13 Car. Rot. 332.

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(b) 1 Roll. Rep. 2. S. C. Ellis and Wallis. 2 Bulſt. 214. S. C. adjudged. Allen 74. S. C. cited.

2. In an Action of Trespass against three, if one dies pending the Writ, and yet Judgment is given against all three; in a Writ of Error upon this Judgment, the whole Judgment shall be reversed, because it is intire, though the Writ by the Death abates but against one. Trin. 14 Car. B. R. between (a) Scudamore and Scriven per Curiam, such Judgment reversed. Intratur Mich. 13 Car. Rot. 507.

(a) All. 43. S. C. cited, and 5 Ed. 4. denied to be Law, which Vide 5 Ed. 4. 7. a. Br. Error 160. and Vide Yelv. 209.

3. (b) If A. brings an Action upon the Case against B. for Words, and also for that he caused him to be indicted, upon which Indictment he was acquitted; and all this is found by Verdict, and Damages severally given for them; but intire Costs, and one intire Judgment given for all, scilicet ideo consideratum est quod querens recuperet damna & custagia in forma prædicta assessa, &c. and in a Writ of Error it is adjudged, the Action does not lie for the Words, the Judgment shall be reversed only for the Words, and Damages for them, and shall stand for the Residue, and the Costs shall stand intirely. Pasch. 12 Jac. my Reports between (c) Jacob and Mills, in Camera Scaccarii adjudged, same Case, Hobart's Reports 8.

(b) Cro. Jac. 424. S. P. adjudged contra; for by the Judgment the Damages are conjoined, though they were severed by the Verdict.

(c) Hob. 6. S. C. adjudged. 1 Roll. Rep. 24. S. C. adjudged. Cro. Jac. 343. S. C. adjudged. All. 75. he says he was told by Noddesd. Secondary, that this Case was not Law. 1 Vent. 27, 40. S. C. cited.

4. (d) If A. brings an Action upon the Case against B. upon two Promises and declares that he sold certain Tallow to the Defendant, and upon this the Defendant assumed to pay so much as it was worth, and that he also at another Day sold other Tallow, and the Defendant made such Promise for it, if the Defendant pleads, that after the first Assumpsit, the Defendant satisfied the Plaintiff for the said first Tallow sold to him, upon which Issue is taken; and as to the other Promise, the Defendant pleads non Assumpsit, upon which they are at Issue also, and the Jury find as to both Issues, that the Defendant assumed and promised modo & forma prout, &c. and assess several Damages, and thereupon Judgment is given for the whole for the Plaintiff: In this Case, though there were several Damages taxed, and the Plaintiff might have relinquished his Damages for the first, which was not well found, and took Judgment for the second which was well found; yet when one Judgment is given for both, the Judgment is erroneous. Pasch. 8 Car. B. R. between (d) Cretall and Murfield, adjudged in a Writ of Error upon a Judgment in Canterbury. Intratur Hill. 6 Car. B. R. Rot. 1128.

(d) Moor 708. pl. 988. S. P. contra. Judgment as to one being reversed, and as to the other, the Damages and Costs affirmed.

(e) All. 24. S. C. cited.

5. (f) If a Fine be levied of Land, of which part is Guildable, and part antient Demesne; and as to that which is antient Demesne, the Fine is reversed by Writ of Diseeit, yet the Fine shall stand for the Residue; for a Mark shall be made on the Fine, in the Nature of a Cancelling of that which is ancient Demesne only. 17 H. 7. Kelloway 43.

(f) F. N. B. 98. P. Cro. El. 469. S. P. arguend' 1 Jo. 374. S. P. 2 Jon. 182.

6. (g) In an Action of Debt upon a Bill, and upon a Contract upon an Emisset, if the Defendant pleads non est factum as to the Bill, and nil debet as to the Contract, and both are found by Verdict against the Defendant, and Judgment against the Defendant quod Capiatur for denying his Deed; and it is not also quod sit in Miserecordia as to the Contract, as it ought to be, and intire Damages given; and a Writ of Error is brought for this, the whole Judgment shall be reversed, scilicet as well the Judgment upon the Bill, as for the Contract. * Trin. 11 Car. B. R. between (h) Elronhead and Deereman resolved, and a like Judgment given in the Marshalsea reversed accordingly. Intratur Hill. 10 Rot. 876.

(g) Gregory and Edes, like Point. 1 Vent. 27, 40. adjorn' 2 Keb. 506, 535.

(*) Fol. 776.

(h) All. 74, 75. S.C. cited.

7. In

7. In a Writ of Dower, if the Plaintiff recovers by Default, and upon this a Writ is awarded to the Sheriff or Bailiff, where the Recovery is to deliver to the Plaintiff tertiam partem per metas, and to inquire of the Value by the Year, and how much Time is past after the first Demand of Dower, and what Damages she hath sustained; and upon this the Sheriff or Bailiff returns that he had delivered the third Part of the Lands, and the Value found by the Jury to 30 l. per Ann. and that two Years are past after the first Demand, and Damages 50 l. and thereupon Judgment is given accordingly, to hold in Severalty the said third part, and to recover the said Damages. In this Case, though the Judgment is not good as to the Damages, in as much as it is not averred that the Husband of the Plaintiff died seised, (as the Use is) nor is it so found by the Jury, nor was it so commanded by the Writ to be inquired, by which the Judgment as to this is erroneous, (a) yet it shall be reversed only as to this, and shall stand as to the Recovery of the third Part of the Land. Trin. 13 Car. B. R. between (b) Tie and Adkins, adjudged per Curiam, in a Writ of Error upon such a Judgment given in Ipswich. Intratur Hill. 12 Car. B. R. Rot. 759.

(a) Where if a Proclamation be on a Sunday, all the Proclamations shall be reversed, cited. 1 Roll.

but the Fine shall stand as a Fine at Common Law. Pl. Com. 266. (b) All. 75. S. C. Abr. 803. pl. 9. S. C.

8. Co. 5. Specot's Case 58. b. 59. adjudged in a Quare impedit, the Judgment to have a Writ to the Bishop, being the Judgment at the Common Law, shall not be reversed in a Writ of Error, though the Judgment given by the Statute of W. 2. for the Damages be erroneous and reversed.

9. (c) In a Writ of Error upon a Judgment in Trespass against several, if the Judgment be erroneous because one of the Defendants was within Age, and appeared by Attorney, the Judgment shall be reversed in toto against all. Pasch. 9 Jac. B. R. Rot. 302. between (d) Bird and Bird contra, Orms and his Wife in Trespass Quare clausum fregit & herbam consumpsit.

(c) Cro. Jac. 303. S. P. adjudged, Dats and Aplet, S. P. All. 74, 75. adjudged. Stile 121, 125. adjudged.

Stile 406. S. P. adjudged. (d) Cro. Jac. 289. S. C. and said the whole Judgment should be reversed, because the Judgment for Damages is intire against all, Sed adjorn'. All. 75. S. C. cited.

10. If an Action be brought against A. as a Feme Sole, where she is Covert Baron, and against B. and C. and they all plead to Issue, and A. as a Feme Sole, and after Judgment is given against them all accordingly, in this Case, the Baron of A. with A. B. and C. may join in Error, and assign for Error the Coverture of A. and thereupon the Judgment shall be reversed for all, because it is intire. Trin. 1651, between (e) Hayward and Williams adjudged, Intratur H. 1649. Rot. 824.

(e) Stile 254, 280. S. C. but S. P. does not appear.

11. In an Action of Account, if Judgment be given quod computet, and after Auditors are assigned, and upon his Account Judgment is given against him also, and Damages and Costs, and after a Writ of Error is brought upon both Judgments, and thereupon last Judgment is only erroneous. In this Case the last Judgment only shall be reversed, and not the first Judgment, but this shall stand in Force, for these are two distinct Judgments and perfect, for the first Judgment is ideo consideratum est quod computet & Defendens in Misericordia. Hill. 43 El. B. R. between (f) Williams and White, in a Writ of Error upon a Judgment in Bristol, adjudged.

(f) Cro. El. 806. S. C. adjudged.

Winch 5. S. C. but S. P. does not appear.

* The Number is wanting here as in the Original, but should be 12.

* If a Judgment be given againſt Executors in an Action of Debt, and after a Scire facias, a Judgment is given againſt them, to have Execution of their proper Goods, and a Writ of Error is brought upon both Judgments; in this Caſe, if the firſt Judgment be good and the laſt erroneous, the laſt Judgment only ſhall be reverſed, and the firſt Judgment ſhall ſtand. Co. 5. Pettiſer 32. adjudged as it ſeems: But it is not alledg'd that the Writ of Error was upon both Judgments, but only in redditione Executionis.

13. Where an Infant and one of full Age join in a Fine, and the Infant after brings Error for the Reverſal thereof, it ſhall be reverſed (a) *quoad* the Infant only. *Mich.* 30 & 31 *El.* between (b) *Piggot* and *Harrington*. 1 *Leon.* 317. ſuch Fine reverſed as to the Infant only.

(a) For this vide 1 Co. 76. b. Hob. 278. 2 Jon. 182.

(b) Piggot and Ruſſel. S. C. Cro. El. 115, 124. adjudged. 2 Leon. 108. S. C. Moor 565. S. C. cited.

Fol. 777.

(F) What Judgment ſhall be reverſed by Conſequence, by the Reverſal of others.

1. After a Recovery in a Rediſſeiſin, if the firſt Judgment be reverſed, the Judgment upon the Rediſſeiſin ſhall be reverſed alſo.

(a) 43 E. 3. 3. Co. 8. Doctor Drury 143. 11 H. 6. 17. b.

(a) Br. Error 23. S. C.

2. (b) If a Man recovers in Debt upon a Judgment, if the firſt Judgment be reverſed, the ſecond Judgment ſhall alſo. (c) 43 E. 3. 3. 11 H. 6. 17. b.

(b) 1 Sid. 253. S. P. and the Court took Time to Adviſe, whether by the Reverſal of the firſt Judgment, the other was not Ipſo facto void, Palm. 187. per Doddridge, the Reverſal of the firſt Judgment does not reverſe the ſecond, but defeats it, ſo that the Plaintiff ſhall have no Fruit thereof. Palm. 303. S. P. per Chamberlain Juſtice.

(c) Br. Error 23. S. C.

3. By Reverſal of the original Judgment, the Outlawry depending thereupon ſhall alſo be reverſed. (d) 11 H. 4. 6. b. (e) 7 H. 6. 44.

(d) Fitz. Er. 64. S. C.

(e) Br. Error 70. S. C. Fitz. Err. 18. S. C.

4. (f) But by the Reverſal of the Outlawry, the original Judgment ſhall not be reverſed. (g) 7 H. 6. 44. b.

(f) 2 Brownl. 39. S. P. appeared.

(g) Br. Err. 70. S. C.

5. If a Man recovers in an Annuity, and in a Scire facias thereupon afterwards, and the Judgment upon the Scire facias is after affirmed in a Writ of Error, yet if the firſt Judgment of the Annuity be reverſed the other ſhall be alſo. (h) 11 H. 4. 48.

(h) Br. Err. 46. S. C. Fitz. Err. 63. S. C.

6. If a Man recovers upon an Original, and hath another Judgment in a Scire facias, if the firſt Judgment be reverſed, the other ſhall be alſo reverſed. Co. 8. Doctor Drury 143.

7. If a Man recovers in a Quare impedit, and hath a Writ to the Bishop, and after recovers against the Bishop in a Quare non admisit, and after the Judgment in the Quare impedit is reversed, the Judgment in the Quare non admisit shall be also reversed by this, though this was for the Contempt to the King. 26 E. 3. 75. b.

8. If a Judgment be given in an inferior Court against A. and after another Judgment against B. his Pledge there, and B. upon this is taken in Execution upon the Judgment; and after the principal Judgment is reversed in a Writ of Error, a special Writ may be awarded to deliver him, because it appears by the Record that he was Pledge. (a) 1 H. 7. 12. b. adjudged.

(a) Br. Err. 134. S. C. My first Part 630. pl. 14. S. C.

9. If the Demandant recovers against the Tenant, and the Tenant against the Vouchee, if the Heir of the Vouchee reverses the Judgment of the Value, because the Vouchee was dead at the Judgment rendered, this shall reverse the Judgment against the Tenant also. Quære, 18 E. 3. 38.

10. If the principal be outlawed of Felony, and the Accessory attainted and executed; and after the Principal reverses the Outlawry, and is indicted and found Not guilty of the Felony; by this Reversal and Acquittal, the Attainder against the Accessory is annihilated, for his Heir may have a Mortdancester it seems, because he hath no Remedy by Writ of Error, or otherwise to reverse it, for this depends upon the Principal. Tempore E. 1. Mortdancestor 46. Co. 9. Lord Sanchar 119. b.

(G) In what Cases collateral Things shall be reversed by Reversal of others.

Things executed.

1. If the Cousee of a Statute recovers in Detinue by erroneous Judgment against the Garnishee, and sues Execution; if the Garnishee in a Writ of Error reverses the Judgment given in the Detinue, yet the Execution is not reversed (*) by this, because it is a collateral Thing executed. (b) 7 H. 6. 42. Co. 8. Doctor Drury 142. b.

(*) Fol. 778.

(b) Br. Err. 66. S. C. 5. Co. 90. b. S. C. cited. 8 Co. 143. S. C. cited.

S (H) Judg-

(a) 3 Inſt. 214, 215.

(H) Judgment, (a) Reſtitution.

1. IN an Aſſiſe, if the Tenant loſes by Verdict, he ſhall be reſtored to the Lands, if it be reverſed in a Writ of Erroz. 8 H. 6. 2.

2. If the Tenant in an Aſſiſe loſes by Verdict, he ſhall be reſtozed to the meſne iſſues, if it be reverſed in a Writ of Erroz. 8 H. 6. 2.

3. If the Tenant loſes in a Writ of Entry, Sur diſſeiſin, and after it is reverſed foz Erroz, he ſhall be reſtozed to the mean Iſſues. Contra 1 E. 3. 22. but Quære.

(I) To what Thing he ſhall be reſtored after Reverſal.

To a collateral Thing executed.

(b) Cro. El. 278. L. P. ſeems to be agreed per Cur'. Moor 573. pl. 788. S. P. per Cur' & Vide 2 Leon. 96, 3 Leon. 89. Godbolt 27.

1. (b) IF a Man recovers Damages, and hath Execution by Fieri facias, and upon the Fieri facias the Sheriff ſells to a Stranger a Term foz Years of Land of the Party, and after the Judgment is reverſed, he ſhall be reſtozed only to the Money foz which the Term was ſold, and not to the Term it ſelf, becauſe the Sheriff had ſold it by the Command of the Writ of Fieri facias. Co. 8. Dr. Drury 143. Matthew Manning 19. b. Co. 5. Hoe 90. b. Dyer 20 El. 363. 24. Goulſ. 103, 104. Cro. Jac. 246.

(c) Cro. Eliz. 278. S. P. adjudged where a Termor being outlawed upon the Statute of Recuſancy, the Lord Treaſurer and Barons of the Exchequer ſold the Term.

2. (c) If the Goods of an outlawed Man are ſold by the Sheriff upon a Capias utlegatum, and after the Outlawry is reverſed by Writ of Erroz, he ſhall be reſtozed to the Goods themſelves; becauſe the Sheriff was not compellable to ſell theſe Goods, but only to keep them to the Uſe of the King. Co. 5. Hoe's Caſe 90. b.

(d) Goodier and Ince. S. P. Cro. Jac. 246. adjudged. Yelv. 179. S. P. adjudged. 1 Brownl. 107, 108.

3. (d) If a Man recovers Damages in a Writ of Covenant, as the particular Caſe was againſt B. and hath an Elegit of his Chattels, and of the Moiety of his Lands, and the Sheriff upon this Writ delivers a Leaſe foz Years of Land, which B. had to the Value of 50 l. to him that recovered, per rationabile pretium & extentum, (as the Wozds were) to have as his own Term in full Satisfaction of 50 l. Part of the Sum recovered; and after B. reverſes the ſaid Judgment, he ſhall be reſtozed to the ſame Term, and not to the Value; foz though the Sheriff might have ſold the Term upon this Writ, yet (e) here is no Sale to a Stranger; but a Delivery

(e) That it would be otherwiſe if ſold to a Stranger. Yelv. 108. 1 Brownl. 107, 108.

of the Term to the Party that recovered by Way of Extent, without any Sale, and therefore the Owner shall be restored. Pasch. 16 Jac. B. R. between Buckhurst and Mayo adjudged per Curiam: for the Sheriff is not bound by this Writ to sell the Land, as he is in a Fieri facias: Quære this Case, for this is a Sale, the whole Term being delivered to the Party according to the Value in Gross, not yearly.

4. The Law would be the same, if personal Goods were delivered to the Party per rationabile pretium & extentum, upon the Reversal of the Judgment he should be restored to the Goods themselves, for the Cause aforesaid. Pasch. 16 Jac. in the Case between Buckhurst and Mayo, agreed per Cur'.

5. (a) If in Debt, upon an Escape, the Plaintiff recovers and hath Execution, and after the first Judgment is reversed, yet the Judgment for the Escape remains in Force. 8 *Co.* 142. *b.*

(a) 3 Mod. 325. S. C. cited.

6. So if a Man recovers by erroneous Judgment, and by Virtue thereof presents to a Church, or enters into the Perquisite of his Villein; and after the Judgment is reversed, these collateral Things executed shall not be devested thereby. 8 *Co.* 142. *b.*

7. But collateral Things executory, are as if no Judgment had ever been, when reversed. 8 *Co.* 142. *b.*

8. Therefore if an Action of Escape be brought against the Sheriff, and the Judgment upon which it is found is reversed; before such Time as the Defendant is forced to plead, he may plead *nul' tiel Record.* 8 *Co.* 142. *a.*

9. But there is a Diversity between a Recovery by prior Title, and a Reversal of a Judgment by Writ of Error; as if a Woman hath Judgment and Execution in Dower in ancient Demesne, and it is after reversed in a Writ of false Judgment; and because she had held the Lands for two Years between the first Judgment and Reversal, the Value of the Land is inquired, and taxed at twenty Marks in a *Scire facias* against her, she cannot plead a Recovery in a Writ of Right Close in Nature of a *cui in vita.* 8 *Co.* 143. *a.*

10. If an Advowson comes to the King by Forfeiture upon an Outlawry, and the Church becoming void the King presents, and then the Outlawry is reversed, yet the King shall enjoy that Presentment, because the Presentment there came to the King as the Profit of the Advowson. *Mich.* 30 & 31 *El.* between *Beverly* and *Cromwall. Moor* 269. *pl.* 421. agreed *per Cur'.*

11. But if a Church be void at the Time of the Outlawry, and the Presentation is thereby forfeited as a Chattel principally and distinct of it self; there, upon the Reversal of the Outlawry, the Party shall be restored to the Presentation. *Mich.* 30 & 31 *El. Moor* 269. *pl.* 421. agreed *per Cur'.*

12. If a Termor being outlawed for Felony grants over his Term, and after the Outlawry is reversed, the Grantee may have Trespass for the Profits taken between the Reversal of the Outlawry and the Assignment; (b) for by the Reversal it is, as if no Outlawry had been, and there is no Record of it. *Hill.* 34 *El. Ognell's* Case. *Cro. El.* 170. adjudged.

(b) Vide 13 Co. 20, 22.

13. If after Judgment in a *Scire facias* against Bail, the Judgment against the Principal is reversed, (c) this is no Reversal of the Judgment against the Bail, because it is a collateral Judgment by it self. *Mich.* 20 *Jac.* between (d) *Appesley* and *Sir John Key. Cro. Jac.* 645. agreed *per Curiam.*

(c) But the Bail may be relieved by Audita querela. Vide My 1st Part, 636. p. 15.

(d) Palm. 187, 301. S. C. and S. P. admitted.

(K) In

Fol. 779.

(K) In Judgments and Executions.

1. If A. recovers in a baſe Court within the County Palatine of Cheſter, and upon this a Writ of Erroꝛ is bꝛought there beforꝛe the Chief Juſtice, and upon this the firſt Judgment was reverſed; and by the Cuſtom in ſuch Caſes, he at whoſe Suit it is reverſed ought to have Coſts; and there upon the Reverſal, Judgment is given that the Party ſhall be reſtoꝛed to all that he had loſt, but no Judgment is given upon the Roll certified in the Writ of Erroꝛ in B. R. that any Judgment was given foꝛ the Coſts, and yet a Scire facias is certified foꝛ levying the Coſts adjudged this is Erroꝛ. Trin. 9 Car. B. R. Between Foden and Maddock per Cur'. Intratur Paſch. 8 Car. Rot. 397. but at another Day upon Examination of the Recoꝛd it appeared to be well.

2. If Judgment be given againſt the Bail, and after a Scire facias is bꝛought againſt the Bail, and a Judgment againſt them, and alſo Judgment given againſt them foꝛ Coſts de incremento, this is erroneous, becauſe no Coſts ought to be given in a Scire facias. Hill. 11 Car. B. R. between Hardey and Browne, adjudged per Curiam, in a Wꝛit of Erroꝛ upon ſuch Judgment in Rippon Court. Intratur Trin. 10 Car. Rot. 979.

(a) Allen 33. S. P. ſaid to have been adjudged, & vide Cro. Car. 179. My 2d Part 754.

3. (a) In a Formedon in diſcender, if the Demandant demands one Meſſuage, one Garden, ten Acres of Meadow, and ten Acres of Paſture; and the Tenant as to the Meſſuage, Garden, two Acres prati & Paſturæ, Parcel of the ten Acres, prati & 10 Acres paſturæ, pleads a Feoffment of the Father of the Demandant, with Warranty and Aſſets, and as to the Reſidue he traverſes the Gift, &c. to which the Demandant as to the firſt Plea takes Iſſue upon the Aſſets, and this is found foꝛ the Damandant, upon which Judgment is given that the Demandant ſhall recover Seiſin of the ſaid Meſſuage, Garden, and two Acres prati & paſturæ; and as to the Reſidue the Demandant relinquiſhes his Iſſue. This Judgment is erroneous, becauſe it does not appear, how much of the two Acres was Meadow, and how much Paſture; ſo that the Sheriff knew not of what Thing to give the Demandant Seiſin. Paſch. 13 Car. B. R. between (b) Prat and Goodier, adjudged in a Wꝛit of Erroꝛ upon ſuch Judgment in Banco, and this reverſed accoꝛdingly. Intratur Hill. 11 Car. Rot. 349.

(b) Cro. Car. 471. S. C. adjudged.

4. In an Action in Banco, if Judgment be given againſt the Pꝛincipal, and after a Scire facias is bꝛought againſt the Bail, and upon this Judgment is given againſt the Bail; yet if there be not any Capias of Recoꝛd ſued againſt the Pꝛincipal befoꝛe the Scire facias bꝛought, this is erroneous. Paſch. 14 Car. B. R. between (c) Griffith and South, adjudged in a Wꝛit of Erroꝛ upon ſuch Judgment, and Judgment againſt the Bail was reverſed accoꝛdingly. Intratur Hill. 13 Car. Rot. 559.

(c) My firſt 671. pl. 1. S. C. which vide with the Notes there.

(L) What

(L) What Act will aid an Error.

Appearance.

1. If a Summons be not well made, if he appears of Record, this takes away the Error, for the Summons is affirmed. (a) 46 E. 3. 30.

(a) Br. Err. 25. S. C. Faux Judgment. 4. S. C.

2. If a Man was never summoned, yet if he appears, it is not Error. (b) 46 E. 3. 30.

(b) Br. Err. 25. S. C. Faux Judgment. 4. S. C.

3. If an (c) Omission be made of any Writ or Process, or one Writ awarded in lieu of another; yet if the Judgment be not given thereupon, but after the Party appears and pleads to Issue, and Judgment is given upon the Verdict; this is not (*) erroneous, because he had not taken Advantage of this before pleading to Issue. (d) 3 H. 6. 9. for he had Day by the Roll, and so no Discontinuance. 29 E. 3. 31. b.

(c) Where an Error in Process is helpt (*) Fol. 780. by Appearance. Cro. El. 83., 767.

Stile 237. 1 Vent. 226, 249. Cro. Jac. 424. 1 Bulst. 143. Lat. 118. Cro. Car. 351. (d) 1 Rol. Abr. 793. S. C.

4. If a Man in Banco brings a Bill upon his Privilege, but hath no Writ of Attachment of Privilege, yet if the Defendant after appears and pleads, this shall be helped by the Appearance. Trin. 13 Jac. B. R. between (e) Havett and Gibbons.

(e) 1 Roll. Rep. 205. S. C. adjudged. 3 Bulst. 61. S. C. adjorn'd.

5. If a Man be indicted, and no Addition is given to him as ought, yet if the Defendant appears and pleads to Issue, and this is found against him; this is helped, for the Addition is ordained by the Statute, for that the Party which is to be outlawed ought to have Notice of it, and here he hath Notice, & constat de Persona by the Appearance. Hill. 18 Jac. B R. (f) Johnson's Case adjudged this being moved in Arrest of Judgment.

(f) Cro. Jac. 609, 610. S. C. adjudged. 2 Roll. Rep. 225. S. C. adjudged; but where by Pleading, the Exception, as to the Want of an Addition, is waived, vide My 1st Part 238.

6. In Debt, if a Capias be the first Process, and not a (g) Summons as ought to be by the Law, though the Defendant appears and pleads to Issue, and this is found against him, upon which Judgment is given, yet this Misawarding of the Process is erroneous and not helped by the Appearance. Pasch. 3 Jac. B. R. between (h) Banks and Pembleton adjudged in a Writ of Error. Pasch. 5 Jac B. R. between (i) Ballard and Cook adjudged, which Intratur Trin. 4 Jac. Rot. 681. Hill. 4 Jac. B. R. between (k) Moile and Catchnud adjudged, which Intratur Trin. 4 Jac. Rot. 1609. Contra Pasch. 11 Jac. B. R. between Inch and Goodfield adjudged.

(g) So where no Bill is filed in the King's Bench or Exchequer. Cro. Jac. 109. Yelv. 165. (h) My 2d Part 431. pl. 11. S. C. 2 Roll. Abr. 277. D. 2. S. C.

(i) My 2d Part 431. pl. 11. S. C. (k) My 2d Part 431. pl. 11. S. C.

7. If a Man be ſummoned to appear in an inferior Court, and the Defendant does not appear, and notwithſtanding the Plaintiff puts in a Declaration and declares againſt him, and after the Defendant appears, and after makes Default, by which Judgment is given againſt him by Default, the Appearance hath helped the putting in the Declaration before Appearance, and ſo it is not erroneous. Trin. 15 Jac. B. R. between Harris and Goodale, in a Writ of Error upon a Judgment in Ipſwich adjudged, and the Judgment affirmed per Curiam. But Houghton ſaid, that this was neither a Miſcontinuance nor Diſcontinuance; but Mountague and Dodderidge ſaid that this was a Miſcontinuance.

8. If in Treſpaſs for an Aſſault and Battery in an inferior Court, if there be a Plaint entered, and a Declaration before any Appearance of the Defendant, and after the Defendant appears without Proceſs and pleads to Iſſue, and this is found for the Plaintiff and Judgment accordingly, this is erroneous, and not helped by the Appearance or Pleading, in as much as there was a Declaration againſt no Body, the Defendant not being then in Court. Mich. 14 Car. B. R. between Brown and Clagg, adjudged in a Writ of Error upon ſuch Judgment in the Court of Marſhalſea, and the Judgment reverſed accordingly. Intratur Paſch. 14 Car. Rot. 325.

9. If an Action be brought in an inferior Court againſt J. S. if the Plaintiff declares againſt him in Cuſtodia of the Serjeant and Miniſter of the Court, and it does not appear that the Serjeant had any Proceſs or Precept to arreſt him, and the Defendant appears and demurs for this Cauſe upon the Declaration, and upon this, Judgment is given againſt the Defendant, this is erroneous, for upon his Appearance he pleaded this Matter. Trin. 1649. between (a) Lawe and Doddeſworth, adjudged in a Writ of Error upon a Judgment in York, (as it ſeems) and the Judgment reverſed accordingly.

(a) Poſt. 1 Roll. Abr. 795. S. C.

10. If Judgment be given in an inferior Court, and (b) no Plaint entered, it is Error. *Mich.* 29 & 30 *Eliz.* between *Knight* and *Savage.* 1 *Leon.* 189, 302. and a Judgment in Debt reverſed accordingly; the Record being that the Defendant (c) *ſummonitus fuit*, where the firſt Entry ought to be, *A. B. queritur verſus C. D. &c.* and the Summons ſo entered is not any Plaint.

(b) Yelv. 158. and Vide 1 Roll. Rep. 338.

(c) Cro. Jac. 108, 109.

11. A *Capias* was directed to the Sheriff of *B.* and it was returned by one who was not Sheriff, and this was held a manifeſt Error; but becauſe the Defendant had appeared after, and pleaded, it was held not material. *Mich.* 38 *Eliz.* between *Thorougood* and *Sewys. Cro. Eliz.* 582. adjudged.

12. The Writ was in Debt for forty Pounds, and the *Capias*, and all the Proceſs to the Return of the *pluries Capias* accordingly; and then the Entry was, that *Querens obtulit ſe in Placito* 40 *s.* and upon the Default of the Defendant an Exigent was awarded, and the Defendant after appeared and pleaded, and confeſſed the Action; and this was held no Error, being helped by the Appearance, for as an Appearance ſaves Defaults in mean Proceſs, ſo it ſaves the Fault of the (d) Continuance by an *obtulit ſe.* *Mich.* 10 *Car.* between *Lovelace* and *Juniper. Cro. Jac.* 311. adjudged upon a Writ of Error brought in *B. R.* upon a Judgment in *B.*

(d) Stil. 209. Swift and Not. 1 Keb. 641. 1 Sid. 173. & vid. Cro. Eliz. 367.

13. If upon an *Audita querela*, a *Scire facias* be brought bearing Date before the *Audita querela*, and the Defendant appears, and for this Cauſe demurs, this Fault is cured by the Appearance; for the *Audita querela* is more of the Nature of a Commiſſion than Writ, and if the Party be in Court, the Matter ought to be inquired into, without inquiring into the Nature of the Proceſs by which he was brought in. *Hill.* 20 & 21 *Car.* 2. between (e) *Vaughan* and *Lloyd.* 1 *Sid.* 406. adjudged.

(e) 1 Vent. 7. S. C. adjudged, the Scire facias being only in the Nature of meſne Proceſs, to bring in the Party to Anſwer. 2 Keb. 461.

14. But

14. But a *Scire facias* upon a Judgment differs, and a Fault therein will not be cured by Appearance. *Hill.* 20 & 21 *Car.* 2. (a) 1 *Sid.* 406. *per Cur'.* (a) 1 Vent. 7. S. P. perCur'. For this is the Foundation, & quaſi an Original, and if an Original ſhould bear Date on a Sunday, or other like Defect be therein, it would not be helpt by Appearance.

Pleading (b) abateable.

(b) Poſt. 1 Roll. Abr. 791. f. 1, 2.

Fol. 781.

(M) What Act will help an Error.

1. If in Treſpaſs of Charters taken, the Plaintiff does not count of the Quantity of the Land compriſed in the Charters, (admitting that he ought) yet if the Defendant does not take Advantage thereof, but pleads, and Judgment is given againſt him, this helps the Error, and he ſhall not aſſign it for this. (c) 20 Aſſ. 3. (c) Br. Err. 119. S. C. Poſt. p. 12. Vide,

2. If a Feme Sole brings Treſpaſs, and recovers, and a Writ of Inquiry of Damages is awarded, and before the Return thereof the Plaintiff takes Husband, and after the Writ is returned, and Judgment given thereupon, without any Exceptions taken by the Defendant, he ſhall not have Advantage of this in a Writ of Error, becauſe the Writ was only abateable by Plea. Mich. 40, 41 Eliz. B. R. between Smith and Odyham adjudged.

3. If an Action be brought againſt Sir Francis Forteſcue Militem & Barronettum, and he appears and pleads to Iſſue, and a Verdict and Judgment is given for the Plaintiff, the Defendant in a Writ of Error ſhall not have Advantage to ſay, that he was a Knight of the Bath, not ſo named, in as much as he had appeared to the other Name and pleaded, and ſo had concluded himſelf. Paſch. 16 Jac. B. R. between (d) Markham and Sir Francis Forteſcue adjudged. (d) 1 Roll. Rep. 450. S. C. adjudged. 1 Roll. Abr. 791. f. 5. S. C. 869. pl. 12. S. C.

4. Upon a Trial between a Peer of the Realm and another, the Sheriff does not return any Knight as he ought, if the Peer does not challenge the Array, but the Jury give a Verdict, he ſhall not have Advantage thereof afterwards. Paſch. 9 Car. between the Lord Powis and Kirtman, adjudged in a Writ of Error upon a Judgment in Banco, for he may waive his Privilege, and the Trial be without any Knight.

(N) What Act will help an Error, where the Error appears of Record.

1. IF a Man be indicted for a Conſpiracy, and no Year or Place alledged of the Conſpiracy, though the Defendant did not take Exception to it, but pleaded Not guilty, and Judgment is given againſt him, this Pleading ſhall not help the Error. 24 E. 3. 35. b. 36. adjudged.

2. If a Man be indicted as of a Conſpiracy, where the Matter ſhewed it was Extortion and not Conſpiracy, though the Defendant pleaded Not guilty, and a Judgment is given againſt him, yet this ſhall not help the Error, for this appears upon the Record. 24 E. 3. 36. adjudged.

(O) What Thing will help an Error.

In what Caſe a Verdict will help it.

1. IF an Action againſt Baron and Feme, if the Plaintiff declares that they dixerunt of the Plaintiff certain ſcandalous Words ſuch a Day and Year, if the Defendants plead Not guilty, and the Jury find the Baron Guilty, but find the Feme Not guilty, in this Caſe the Plaintiff ſhall have Judgment; for though the Words by the Baron and Feme could not be jointly ſpoke, in as much as they have two Mouths, and the Speaking of one is not the Speaking of the other, ſo that it ſhall be intended that they (*) ſpoke the Words ſeverally at the ſame Time; in which Caſe the Action ought not to have been brought againſt both, in as much as if they had been both found Guilty; there ought to have been two Judgments, ſcilicet, one againſt the Baron and Feme, and the other againſt the Baron only, which is not to be ſuffered upon one Writ; and therefore if the Plaintiff had demurred upon this Declaration, this had not been good, yet when the Feme is found Not guilty, there need be but one Judgment, ſcilicet, againſt the Baron, and therefore the Verdict hath made this good, and ſo the Plaintiff ſhall have Judgment againſt the Baron (a)

(*) Fol. 782.

(a) Mich. 1652. between Burcher and Orchard. Stile 349. adjudged.

2. (a) In an Action of Battery by Baron and Feme, for the Battery of the Baron and Feme; and upon Not guilty pleaded, the Defendants are found Guilty of the Battery of both, and several Damages assessed; in this Case, the Writ shall abate as to the Battery of the Baron, because the Feme cannot join with her Husband for the Battery of the Husband; but the Baron and Feme shall have Judgment for the Battery of the Feme, for it is but one Judgment. (b) 9 E. 4 51. b. adjudged, per Cur'.

(a) 1 Vent. 328. S. P. per Cur' the Husband might Release the Damages for beating himself, and take Judgment for the Rest; & vide Hard 166. (b) Br. Brief 448. S. C. Br. Baron 54. S. C. Fitz. Brief 177. S. C. Br. Trespass 190. S. C.

3. (c) If in Trespass by Baron and Feme for breaking the Close of the Baron, and for a Battery on the Feme *ad damnum ipsor'*; the Defendant, *quoad* the *clausum fregit*, pleads Not guilty, and *quoad* the Battery, justifies, and the first Issue is found for the Defendant, and the last for the Plaintiffs; and though Baron and Feme ought not to have joined in an Action for breaking the Close of the Baron, yet because the Issue in that is found against the Plaintiffs, and so that Part of the Declaration is discharged by the Verdict, the Plaintiffs shall have Judgment upon the other Part wherein they ought to join, and which is found for them. *Hill.* 20 *Jac.* between (d) *Buckley* and *Hale. Cro. Jac.* 665. *per Ley* Chief Justice and *Dodd*, but *Houghton* and *Chamberlain Econtra*, for as they said the Declaration being ill in Substance, the Verdict shall never make it good, *per quod adjornatur*.

(c) 1 Levin 3. S. P. and Judgment staid, none appearing for the Plaintiff.

(d) Palm. 338. S. C. two against two, and therefore no Judgment. 2 Roll. Rep. 272. S. C. two against two and no Judgment.

4. In an Action by Baron and Feme for the Battery of both; as to the Beating the Wife the Defendant is found Guilty, and as to the Beating the Husband Not guilty; this Mistake in the Action is cured by the Verdict. *Pasch.* 28 *Car.* 2. between (e) *Hochet and his Wife* against *Stegold & al'.* 2 *Vent.* 29.

(e) 2 Mod. 66. S. C.

5. If in an Action of Battery against Baron and Feme, the Jury find the Feme only Guilty, and not the Baron; yet the Plaintiff shall have Judgment. *Trin.* 22 *Car.* 2. 1 *Vent.* 93. adjudged, and said, that the Opinion in the Case of (f) *Drury* and *Dennis* in *Yelv.* 106. to the Contrary, was a strange Opinion.

(f) 1 Brownl. 209. S. C. and same Opinion by Williams and Crook. 1 Mod. 140. cited

(P) What Things will help an Error.

(a) Pleading.

(a) Where a bad Declaration, Plea, &c. shall be helped by Pleading over to Issue, or Verdict, vide under Title Pleading.

1. A Man shall never have a Writ of Error for such Thing, of which he might have had Advantage by Plea in the Action, and did not take it, if it does not appear of Record. (b) 3 H. 4. 6. b.

(b) Br. Err. 34. S. C.

2. As if the Sheriff who returns the Panel in an Assise, was Brother to him against whom the Assise passed, if he does not challenge the Array, no Writ of Error lies for this. (c) 3 H. 4. 6. b.

(c) Br. Err. 34. S. C.

(a) Br. Error 34. S. C.

3. The ſame Law if no Hundredor was in the Panel. (a) 3 H. 4. 6. b.

4. So if an Action be brought in three Vills, and the Bailiff of the Franchiſe returns the whole Panel, where the Sheriff ought to have returned Part, ſcilicet, out of one Town; if the Party does not challenge the Array, for this Cauſe, he ſhall never have a Writ of Error thereupon. (b) 3 H. 4. 6. b. nor he in Reverſion ſhall have it by the Statute.

(b) Br. Error 34. S. C. Fitz. Error 58. S. C.

5. If a Man loſes in an Action in the Court of ancient Demeſne, he cannot aſſign it for Error that it was Frankfee, againſt his Affirmance of the Jurisdiction by Pleading there. 18 H. 6. 28. b.

6. If an Alien brings a real Action as Heir to J. S. againſt another and recovers, the Defendant cannot aſſign for Error that he was an Alien born, in as much as he did not take this Exception in the firſt Action. 18 E. 1. lib Par. 23. b. 24. adjudged.

(c) When a Writ is vitious in Subſtance, or when it appears to the Court thereby, that the Party hath no Cauſe of Action, there the Court ex Officio ought to abate it; as if a Woman brings an Appeal of the Death of her Father; or if the Tenant brings Treſpaſs, quare vi & Armis, againſt his Lord; otherwiſe where it is abateable only for collateral Matter of Fact, of which they cannot take Notice as Judges. Palm. 311. per Cur'. (d) When it appears to the Court that the Writ it ſelf is vitious, there it is ipſo facto void, and the Judgment given thereupon is erroneous; but if the Court ought to be aſcertained by Matter dehors that it is ill, and the Defendant does not inform the Court, but paſſes it over and pleads in Bar, this is not Error. Palm. 309. ſaid arguendo.

7. Where the Court (c) ex Officio ought to abate a Writ without Motion of the Party; (d) as for falſe Latin in the Original, if the Party does not take Exception to the Writ, yet he may have a Writ of Error; but otherwiſe it is, if the Court ought not to abate the Writ without Exception of the Party. 3 H. 4. 7.

8. If a Writ be abateable, and the Defendant does not take Advantage thereof but plead to the Action, and after Judgment is given againſt him, he ſhall not have a Writ of Error thereof, for he hath affirmed the Writ by his Plea. 29 Aſſ. 35.

9. As in a Raviſhment of Ward at Common Law, if the Writ be that he rapuit the Ward, where it ought to be cepit & abduxit, and the Defendant pleads to the Action, and after Judgment is given againſt him, he ſhall not have a Writ of Error, for he hath affirmed the Writ by his Plea. (e) 29 Aſſ. 35. adjudged.

(e) Br. Error 125. S. C.

10. If a Woman brings a Writ, and pending this takes Husband, and after * hath Judgment againſt the Defendant, who did not plead this in Abatement, he ſhall not have a Writ of Error thereof, (f) becauſe the Writ was but abateable, and he might have pleaded it, and therefore he hath paſſed the Advantage. (g) 19 Aſſ. 8.

(*) Fol. 783.

(f) But for what will abate a Writ de facto, and what will make it only abateable, vide in Abatement under Title Pleadings.

(g) Br. Error 117. S. C.

11. In a Writ of Entry Sur diſſeiſin, if the Original Writ wants theſe Words (quam clamat eſſe jus & hæreditatem ſuam) and the Tenant admits the Writ, and pleads to the Action and loſes, he ſhall not aſſign this Fault in the Writ for Error, becauſe he admits the Writ good by his Plea. Fitzh. Natura Brevium 21 E.

12. So in a Writ of Detinue of Charters concerning Land, if the Plaintiff in the Count does not ſhew the Certainty of the Land, if the Defendant admits the Count good, and pleads to the Action and loſes, he ſhall not aſſign it for Error, becauſe he admits the Count good. Fitzh. Natura Brevium 21. (h) But Quære.

(h) Ante M. 1.

13. In an Aſſiſe againſt A. and B. they plead ſeveral Pleas, and accept ſeveral Tenancies, and the Demandant accepts B. for his Tenant; if it be inquired of the Pleas, before it be inquired of the Tenancies, the Demandant may aſſign it for Error notwithſtanding his own Accepance. (a) 11 H. 4. 68.

(a) Br. Error 57. S. C. Fitz. Aſſiſe 48. S. C.

14. A Man may aſſign for Error, that after a Juror was drawn upon his Challenge, that the ſame Juror was after ſworn upon the Tales, yet he might have ouſted him by Challenge at the Trial. Vide for this (b) 12 H. 4. 24.

(b) Br. Error 53. S. C. 2 Rol. Abr. 716. K. 3. S. C.

15. If a Writ be abated in Law by a Matter of Fact, and the Party might have abated it by Plea and does not, but Judgment paſſes againſt him, yet he may aſſign it for Error. 19 Aſſ. 8.

16. As if a Writ be brought againſt two Jointenants, and after one dies, and after Judgment is given againſt them, though the Survivor might have abated the Writ by the Death of his Companion, yet it is Error and not helped by this, becauſe the Writ was abated in Fact by his Death (c) 19 Aſſ. 8.

(b) Br. Error 117. S. C.

17. If a Writ of meſne is brought againſt two Coparceners of one Meſnalty, and after one dies, and after Judgment is given againſt them; the Non-pleader of the Death by the Survivor ſhall not help the Error; but he and the Heir of the other which is dead may aſſign it for Error, becauſe the Writ was abated in Fact by his Death. (d) 19 Aſſ. 8. adjudged.

(d) Br. Error 117. S. C. 1 Rol. Abr. 756. S. 3. S. C.

18. If a *Quare Impedit* be brought againſt the Biſhop and Incumbent only, without naming the Patron, though this might have been pleaded in Abatement, yet if the Defendant pleads in Bar, *&c.* it cannot after upon a Writ of Error be aſſigned for Error, for tho' the Want of the Patron's being made a Defendant might make the Writ abateable, yet it was not thereby actually abated; and (e) nothing ſhall be aſſigned for Error concerning the Writ, but what actually abates it. *Mich* 20 *Jac.* between Sir *George Savil* and *Thornton*. *Cro. Jac.* 651. adjudged. (f)

(e) 1 Bulſt. 4, 5, &c. 2 Brownl. 229, 230. but what ſhall actually abate a Writ, and what only makes it abateable. Vide under Abatement, Title Pleading.

(f) Palm. 306, 311. S. C. adjudged. 2 Rol. Rep. 239. S. C. adjudged.

(Q) What

(Q) What Thing will help an Error.

Relation.

1. IF at the Grand Cape returned the Tenant wages his Law by Attorney, who hath no Warrant of Attorney, and at the Day when he ought to do his Law he makes Default, and Judgment is given, yet the Want of the Warrant of Attorney continues an Error, because it is a Discontinuance. 11 H. 4. 88. b.

2. But if the Tenant for Life makes Default after Default, and he in the Reversion is received, and after he appears by Attorney that hath no Warrant, and after makes Default, the Want of the Warrant of Attorney shall not be assigned for Error, because the Judgment is given upon Default of the Lessee. 11 H. 4. 88. b.

3. If a Verdict be quashable for the Misbehaviour of the Jury, as for the receiving Evidence of one Part after Departure from the Bar, which was not given in Evidence at the Bar, if this be not shewed in Arrest of Judgment, no Advantage can be taken thereof in a Writ of Error, for (*) this shall not be examined after Judgment. Mich. 40, 41 El. B. R. between (a) Groves and Short adjudged.

(*) Fol. 784.

(a) 2 Rol. Abr. 715. pl. 15. S. C. Cro. El. 616. S. C. adjudged; for per Poph. the Trial thereof rests only in Examination, and it shall not be tried per pais, as Nonage.

(R) (*) Release

(R) (*) Releaſe (a) of that which will make Error.

(*) Vide 2 Rol.Abr.100.

(a) Where the Plaintiff may releaſe Damages for Part, and take Judgment for the Reſt, vide F. N. B. 107. b. 10 Co.115. a. Moor 281. 1 Leon. 92. 2 Bulſt. 280.

1. IN a Writ of Annuity the Parties are at Iſſue, and it is found for the Plaintiff, but the Jury did not aſſeſs any Damages or Coſts, and after the Plaintiff releaſed the Damages and Coſts, and upon this had Judgment, this Judgment is not erroneous, becauſe the Plaintiff hath releaſed his Damages and Coſts, which is for the Benefit of the Defendant. Co. 11. (b) Bentham 56. adjudged.

1 Brownl. 235. Stile 364. Hard. 58. (b) 2 Bulſt. 280. S. C. adjudged, 1 Rol. Rep. 88. S. C. adjudged, infra pl. 7. S. C.

(c) 2 Sand. 286. Like Point upon Demurrer debated.

2. (c) In a Writ of Debt for 100 l. againſt an Executor, if the Plaintiff counts upon an Obligation for 99 l. and upon a Mutuatus by the Teſtator for 20 s. and upon the Iſſue the Jury find for the Plaintiff in the Whole, and aſſeſs Damages intire, where it appeared no Action lay againſt the Executor upon the Mutuatus of the Teſtator; yet if the Plaintiff releaſes the 20 s. and all the Damages, and hath Judgment for the Reſidue, this Judgment is not erroneous. Paſch. 37 El. B. Aſhford's Caſe, per Curiam.

3. In Treſpaſs, if the Plaintiff counts of Damages to 40 l. and the Jury tax Damages to 49 l. if the Plaintiff releaſes the Overplus, ſcilicet the 9 l. and hath Judgment for the Reſidue, the Judgment is not erroneous. Co. 10. (d) Robert Pilford 115. b. adjudged.

(d) My 2d Part 461. Notes there.

G. 1. S. C. Which vide with the

(e) Cro. Jac. 144. S. P. adjudged, the Ejectment being of Land & libera Piſcaria.

4. (e) In an Ejectione firmæ of Land & de libertate Piſcariæ for free Fiſhery, which is not good for that; if the Jury find for the Plaintiff, and tax Damages intire; and after the Plaintiff releaſes all the Damages and hath Judgment for the Land only; this Judgment is not erroneous, though he cannot properly releaſe the Damages for the Fiſhery where there are none, for he may as well pray Judgment for the Reſidue, and not for this, and relinquiſh the Damages. Hill. 4 Jac. B. R. between (f) Fretzville and Mulleneux adjudged.

(f) Cro. Jac. 146. S. C. cited.

5. In an Ejectione Cuſtodiæ & hæredis, where it does not lie of the Cuſtody of the Heir, but of the Land only, and the Jury found for the Plaintiff, and gave Damages intire; yet the Plaintiff may relinquiſh the Damages and Coſts, and have Judgment of the Land only, and this ſhall not be erroneous. D. 22 El. 369. adjudged, (g) Clifford's Caſe.

(g) Cro. Jac. 104. S. C. cited. 2 Rol. Rep. 272. S. C. cited. 2 Bulſt. 28. S. C. cited. 5 Co. 108. a. S. C. cited. 10 Co. 130. b. S. C. cited. 1 Rol. Abr. 786. U. 2. S. C.

(h) Wood and Pain S. P. Cro. El. 119. adjudged. 3 Leon. 128. adjudged. Stile 30. S. P. adjudged.

6. (h) In an Ejectione firmæ of a Meſſuage, Cottage, and Tenement; if it be found for the Plaintiff, and one intire Penny Damage given to the Plaintiff for the Whole, becauſe an Ejectment does not lie of a Tenement, the Plaintiff may releaſe all the Damages, for that it is intire, and have Judgment for all the Land, ſaving the Tenement, and this ſhall not be erroneous. Hill. 10 Jac. B. R. between (i) Retorick and Chappel, it was ſo done by Advice,

(i) 2 Bulſt. 28. S. C. adjudged.

7. In a Writ of Annuity, if the Plaintiff recovers by Verdict, but the Jury do not find any Damages to the Plaintiff, the Plaintiff may before Judgment release the Damages, and have Judgment to recover the Annuity, and this Release of the Damages, though none were found, shall help the Error. Mich. 12 Jac. B. R. between (a) Bent and Marsh adjudged; but there they seemed also that this would not make the Judgment erroneous without the Release: Quære this.

(a) 1 Rol. Rep. 88. S.C. adjudged. 2 Bulst. 280. S. C. adjudged. supra pl. 1. S. C.

8. In a Quare impedit, if the Jury give Damages and Costs where no Costs ought to be given, for that the Statute did not give them; and after Judgment is entered quod nullo habito respectu of the Costs, the Court awards that he shall recover the Damages; this special Entry, without any Release of the Costs, shall help the Error. Pasch. 14 Jac. B. R. between (b) Grange and Denny adjudged in a Writ of Error.

(b) 1 Rol. Rep. 363. S.C. adjudged. 3 Bulst. 174. S. C. adjudged.

Fol. 785.

9. If a Bill of Debt be brought against an Attorney upon three several Obligations, and upon Demand of Oyer, it appears by the Condition of one of the Obligations, that the Day of Payment thereof is not yet come; after a Verdict for the Plaintiff upon Conditions performed pleaded, and Costs and Damages given, though the Plaintiff cannot have Judgment for this Obligation, of which the Day of Payment is not yet come; yet upon his Release of Costs and Damages, he shall have Judgment for the other Obligations. (c) Hob. 240. (d) It seems he need not release the Costs.

(c) Hob. fol. 178. S. C. 1 Sand. 286. S. C. cited. (d) In the Original 'tis Semble.

10. If in Debt upon the Statute of *Usury*, it is laid in the Writ that he *Corruptive* lent 40 *l. &c.* and that he lent 20 *l. &c.* but it is not said *Corruptive*, and the Defendant pleads *Nil debet*, and it is found against him, the Plaintiff shall have Judgment as to the 40 *l. Mich.* 3 *Jac. Woody*'s Case. *Cro. Jac.* 104. adjudged. And it was said in this Case, that if the Defendant had demurred, the Plaintiff should have had Judgment for this Part.

11. If in Trespass the Plaintiff declares for taking the Mare of the Plaintiff, and several Goods, but does not say of the Plaintiff, and thereupon the Defendant demurs; the Plaintiff may have Judgment for the Mare, and release the Action for the Rest. *Trin.* 32 *Car.* 2. between *Cutforthy* and *Taylor. Raym.* 395. adjudged.

(S) What Thing, &c.

Releaſe of that which will make Error and ſpecial Entry, *nullo habito reſpectu, &c.*

1. (a) IN an Action of Debt for 10 l. if the Plaintiff declares upon a Leaſe for Years, rendring Rent at certain Feaſts, and concludes & quia 10 l. of the ſaid Rent for ſuch a Time, ending at ſuch a Feaſt, &c. he brought this Action, where it appears by the Declaration it ſelf, that there was 4 s. wanting of the 10 l. ſo that the Rent in Arrear amounted but to 9 l. 16 s. and thereupon the Defendant pleads Nil debet; and upon this there is a Verdict for the Plaintiff, and Damages and Coſts given, though the Demand be intire, ſcilicet, of 10 l. and it appears by the Plaintiff's own Shewing, that he had no Cauſe of Action for the Whole; yet the Plaintiff may releaſe the 4 s. and Damages, and take Judgment for the reſt. Mich. 1649. between (b) Barber and Pomrey adjudged, per Curiam, præter Juſtice Jermin, this being moved in Arreſt of Judgment. Intratur Hill. 24 Car. Rot. 595. B. R.

(a) 2 Sand. 286. Like Point upon Demurrer debated, but no Judgment given, & vid. All. 29.

(b) Stil. 175. S. C. adjudged niſi by three Judges, con. Jermyn.

(T) What Thing will help an Error.

Releaſe of that which will make an Error.

Vide in Titles (*) Judgment, Releaſe, &c.

(*) Vide 2 Rol. Abr. 100.

1. IN an Action of Aſſault and Battery againſt four, for two Treſpaſſes ſuppoſed to be done at two ſeveral Days; if one Defendant pleads Not guilty to both Treſpaſſes, and another Defendant pleads Not guilty to the firſt Treſpaſs, and juſtifies the ſecond Treſpaſs by the Aſſault of the Plaintiff himſelf, and the other two Defendants plead Not guilty as to the firſt Treſpaſs, and Judgment is given againſt them by non ſum informatus for the ſecond Treſpaſs; and upon theſe ſeveral Pleas, ſeveral Iſſues being joined, and all found for the Plaintiff; and the Jury gave 40 s. Damages for all, againſt all the Defendants, and alſo taxed 1 d. Damages for the Treſpaſs againſt the two, againſt whom Judgment was given by Non ſum informatus, which is not good; yet if the Plaintiff releaſes the 1 d. Damages, and takes Judgment againſt all the 4 Defendants

for the 40 s. Damages, and for the Costs assessed by the Jury; this has helped the Verdict, and by this the Judgment is good, and not erroneous. Mich. 9 Car. B. R. between Eastcot and others, Plaintiffs, against Edwards adjudged in a Writ of Error upon a Judgment in Banco. Intratur Pasch. 9 Car. Rot. ultimo.

2. In Trespass for an Assault, Battery, and taking his Grain, if the Defendant pleads a Justification of the Battery, in Defence of his Corn, upon which it is demurred, and Not guilty to the Corn, upon which Issue is joined, and it is found for the Plaintiff, and Damages taxed for the Corn, but none for the Battery, for which there is a Demurrer pending, as there ought to be; yet the Plaintiff may relinquish the Demurrer, and pray Judgment for the Corn, and this will not be Error. Pasch. 11 Car. B. R. between Vashman and Rowe, per Curiam, and this was so accordingly. Hill. 23 Car. B. R. between Linton and Turnor, adjudged. In an Assault, Battery and Wounding, and Not guilty pleaded to all besides the Assault, and upon this a Demurrer and Issue was found for the Plaintiff, and Damages taxed for this only, and not for the Assault, nor any Warrant by the Writ to inquire thereof, but only of the Issue; yet the Plaintiff shall have Judgment relinquishing the Demurrer. Intratur Mich. 22 Rot. 659.

3. In Trespass for a Battery against two, if one pleads Not guilty, and the other pleads a special Plea, and upon this a Demurrer is made by the Plaintiff, and it is adjudged for the Plaintiff, (a) he may relinquish his Action against the other, and have his Writ to inquire of the Damages against him. Pasch. 11 Car. B. R. between Starr and Cuckow, adjudged in a Writ of Error upon such a Judgment in Banco, and this affirmed per Curiam. Intratur Mich. 10 Car. Rot. 514.

(a) For this vide 2 Rol. Abr. 100.

4. In an Action of Trespass, if there be three Issues joined, scilicet, one Not guilty to Part, the second upon a Prescription for Common, the third whether the Beasts raptim momorderunt, in going to take the Common; and the Jury find the first Issue for the Plaintiff, and the second Issue for the Defendant, but did not inquire of the third Issue; the (b) Plaintiff relinquishing the third Issue, may pray Judgment for the first Issue, and this shall prevent any Error. Mich. 13 Car. B. R. between Brown and Stephens adjudged.

(b) For this vide 2 Rol. Abr. 100.

I

(U) What

(U) What will help an Error.

Releaſe of that which will help the Error.

1. IN an Ejectione firmæ, if Part of the Things demanded be well demanded, and Part of the Things demanded not well demanded, and a Verdict given for the Plaintiff for the Whole, and intire Damages given; the Plaintiff may releaſe all the Damages in that which is not well demanded, and pray Judgment for the Reſidue, and this helps the Error, if Judgment be given accordingly. Trin. 11 Car. B. R. between (a) Clive and Vere. Rot 1378.

(a) Cro. Car. 458. S. C.

2. In an Ejectione cuſtodiæ terræ & heredis, if a Verdict be given for the Plaintiff, the Iſſue being upon the Tenure, and intire Damages given and Coſts, the Plaintiff may relinquiſh the Damages and Coſts, and have Judgment of the Ejectment of the Land only, for that ſuch Writ does not lie for the Body. (b) Dier 22 El. 369, 56. adjudged.

(b) 1 Roll. Abr. 784. R. 5. S. C. Which vide with the Notes there.

3. In an Ejectione firmæ de uno tenemento, and ſeveral Acres of Land, upon Not guilty pleaded, if a Verdict be given for the Plaintiff, and intire Damages found; where the Action does not lie for the Tenement for the Uncertainty, the Plaintiff may relinquiſh his Damages, and have Judgment for the Lands only, without Error. My Reports. 10 Jac. between (c) Rhetorick and Chappel adjudged.

(c) 2 Bulſt. 26. S. C. 1 Rol. Abr. 784. pl. 6. S. C. Which vide with the Notes there.

(X) What Thing will help an Error.

Relinquiſhing that which will make Error.

(*) Fol. 787.

1. IN an Action of Waſte, if the Plaintiff aſſign the Waſte in three Meſſuages, and ſix Gardens, viz. for cutting in uno pomario 6 piros & 10 pomos in aliis pomariis, 7 piros & 10 pomos, and upon Default (*) of the Defendant, a Writ of Inquiry of Waſte according to the Statute, is awarded to the Sheriff, who found by Inquiſition the Waſte in three Meſſuages, and in cutting down in uno pomario, 2 piros & 2 pomos & in præd' al' pomar' 2 piros & 2 pomos ad damnum 50 l. but did not inquire of the Waſte in the Reſidue de piris & pomis, and Judgment is given thereupon, for that which is found without any ſpecial Entry of the Relinquiſhment of the Reſidue; yet this is not Error, becauſe the Plaintiff might abridge his Demand, as this Caſe is, for that the Waſte is found in every Pomario, tho' not in cutting down ſo many Trees as he declares; tho' if the Jury had found him Not guilty of the Reſidue, he ought to have been amerced for them, as the Precedents are. Paſch. 11 Car. B. R. between (a) Fitz and King, dubitatur among the Juſtices, and after the Matter was ended by Agreement. Intratur Trin. 9 Rot. 213.

(a) Cro. Car. 453. S. C.

2. But Note, that in the Debate of this Caſe, two Precedents were ſhewed, by which it appeared to be good. Mich. 22 E. 3. b. Rot. 220. in dorſo in Scaccario. Hill. 21 El. Rot. 232. in Scaccario.

(b) Fitz. Waſte 12. S. C.

3. (b) 22 E. 3. 1. b. Waſte aſſigned in Land and Wood, and an Inquiry made only of the Waſte in the Land; yet for that the Plaintiff prayed his Judgment of that which was found, he had Judgment without a new Inquiry made.

4. But vide 14 E. 3. Waſte 27 per Cur' econtra, for that if the Jury had found the Defendant Not guilty of the Reſidue, the Plaintiff ſhould have been amerced.

(Y) In (c) what Caſes *conſenſus tollit Errorem.*

(c) For this vid. 5 Co. 40. b. many Caſes 2 Rol. Rep. 21. Godb. 428. Noy 107.

(d) Br. Err. 184. S. C.

1. UPON a cepi Corpus, if the Defendant appears by Attorney, by Conſent, it is not Error. (d) 21 E. 4. 77. b.

2. So if the Defendant appears by Attorney upon the Exigent by the Aſſent of the Plaintiff, it is not Error. 7 H. 6. 21.

(Z) (a) For Trials.

1. IN Treſpaſs, Villainage in the Plaintiff to a Mañor in another County is pleaded, the Trial ought to be where the Writ is brought; yet if it be tried by Aſſent where the Manor is, it is not Error. 44 E. 3. 6. b. (b) 44 Aſſ. 4.

(b) Fitz. Enqueſt 53. S. C.

5 Co. 40. b. S. C. cited. Raym. 372. S. C. cited.

2. Upon an Iſſue, if the Court be in Doubt by what County it ſhall be tried, and the Court by Aſſent of the Parties, grant of both Counties; this is not Error. 7 H 6. 21.

3. In Debt upon an Obligation; if the Condition be to pay Money apud Coventriam, and Iſſue thereupon, and this is tried in Middleſex by Aſſent of the Parties, and by Order of Court where the Action is brought, and not in Coventry; yet (c) if the Aſſent of the Parties does not appear upon the Record, though it be confeſſed by the Demurrer it ſhall be Error. My Reports 12 Jac. Camera Scaccarii, between (d) Edwards and Crow adjudged in a Writ of Error, the ſame Caſe, Hobert's Reports 8.

(c) Theſe kind of Conſents ought to be entered upon Record Hob. 266. 2 Inſt. 124.

Cro. El. 664. (d) 1 Rol. Rep. 28. S. C. adjudged, Hob. fol. 5. S. C. 1 Bulſt. 216. ſeems to be S. C. however S. P.

4. (e) If an Ejectione firmæ be brought and laid in the County of D. for Lands lying in another County, though it be by Aſſent of the Parties, and the Defendant pleads Not guilty, and a Verdict and Judgment is given for the Plaintiff; yet this is Error, for this is againſt the Law, which cannot be altered by the Conſent of the Parties. Hill. 14 Car. B. R. per Curiam; but upon View of the Record, it could not appear to the Court that the Land lay in another County, and therefore they did not reverſe the Judgment for this Cauſe.

(e) Macdonogh and Stafford, S. P. upon a Trial in Ireland, there being a ſpecial Entry made upon the Roll. 2 Rol. Rep. 166. Adjudged con' upon a Writ of Error, the Court being certified that ſuch Trials were uſual there, Palm. 100. adjudged con' Raym. 372. S. P. adjudged con' 2 Jon. 199. S. P. adjudged con' upon a Trial in Ireland, the Conſent being entered on Record. Vide Dier 284. 1 Sid. 339.

5. If a *Venire facias* be awarded to the Coroners, where it ought to be to the Sheriff, or the *Viſne* cometh out of a wrong Place, if it be *per aſſenſum partium*, and ſo entered of Record, it will ſtand good. *Co. Lit.* 125. *b.*

(A) Bars

Fol. 788.

(A) Bars of a Writ of Error.

(a) Br. Err. 9. S. C. Fitz. 20. S. C.

1. A Releaſe of all Errors is a good Bar. (a) 9 H. 6. 48.

2. A Releaſe of Actions and Demands, and of Right in the Land, will be a Bar of a Writ of Error upon a Judgment in Redi-

(b) Fitz. Err. 64. S. C.

ſeiſin. (b) 11 H. 4. 6.

(c) Where by a Writ of Error the Plaintiff ſhall recover, or be reſtored to any perſonal Thing, as Debt, Damage, or the Like; the Releaſe of all Actions perſonal is a good Plea; and when Land is to be recovered, or reſtored in a Writ of Error, a Releaſe of all Actions real is a good Bar: But where by a Writ of Error the Plaintiff ſhall not be reſtored to any perſonal or real Thing, a Releaſe of all Actions real or perſonal, is no Bar. Co. Lit. 288. b. 8 Co. 152. and vide 2 Rol. Abr. 405. S. 1. and my firſt Part. 1. pl. 1.

3. A Releaſe of all Actions (c) real and perſonal, will Bar a Writ of Error upon a Judgment in a Writ of Right. 9 H. 6. 46. b. 48. b.

(d) Br. Err. 9. S. C. Fitz. 20. S. C.

4. A Releaſe of all his Right in the Land, will releaſe a Writ of Error upon a Judgment in real Actions. (d) 9 H. 6. 46. b. 48. b.

(e) Where a Man is outlawed in a perſonal Action by Proceſs upon the Original, and brings Error

5. If a Man (e) outlawed upon a Rediſſeiſin, releaſes all Actions to the Recoveror, yet he may have a Writ of Error of the Outlawry, becauſe that this does not belong to the Party, but to the King in Intereſt, and he may aſſign Error in the Judgment of the Rediſſeiſin to reverſe the Outlawry. (f) 11 H. 4. 6. b. 94. adjudged.

a Releaſe of Actions perſonal is no Bar, becauſe he is to be reſtored to nothing againſt the Plaintiff, though when by the Outlawry he forfeited all his Goods to the King, he ſhall be reſtored to them, and to the Law, ſo as to be of Ability to ſue, &c. Co. Lit. 288. b. 8 Co. 152. a. (f) Fitz. Err. 64. S. C.

(g) 1 Rol. Abr. 748. pl. 22. S. P.

6. (g) If the Tenant pending a Præcipe againſt him, aliens in Fee, and repurchaſes for Life, and after Judgment is given againſt him, he ſhall have a Writ of Error, and his Feoffment is no Bar.

7. So after his Death his Heir ſhall have a Writ of Error for the Privity which he hath to the Judgment, though he ſhall have nothing in the Land, contra 50 Aſſ. 3.

(h) 1 Rol. Abr. 748. pl. 20. S. P.

8. (h) If the Tenant pending a Præcipe againſt him, aliens in Fee, and after Judgment is given againſt him, and he brings a Writ of Error, this Feoffment is not any Bar of the Writ, becauſe he was privy to the Judgment after. (i) 12 Aſſ. pl. 41 Co. 1. Albany

(i) Br. Err. 111. S. C. Bridg. 77. S. C. cited.

111. (k) 20 Aſſ. 2. adjudged. Dubitatur (l) 21 E. 3. 53. b.

1 Rol. Rep. 306. S. C. cited. (k) Br. Err. 118. S. C. (l) Fitz. Err. 74. S. C.

9. If a Plea be diſcontinued, or an eſſoin allowed for the Tenant, where it does not lie, and after Judgment is given againſt the Demandant upon his Nonſuit, and he brings a Writ of Error, this Nonſuit is not any Bar, (m) becauſe the Error was before the Non-

(m) The not allowing an eſſoin when

ſuit. 22 E. 3. 2. adjudged.

it ought to be allowed, is Error, but not econtra. 8 Co. 59. a. Hob. 47.

10. If a Man, that hath Title to a Writ of Error to reverse a Fine, makes a (a) Feoffment of Part of the Land, this is a Bar only for that Part, and not for the Reſt, of which he hath not made any Feoffment. Trin. 5 Jac. B. R. between Wright and Jennings, per Curiam, præter Tanfield. M. 38, 39 El. B. R. between (b) Wright and the Mayor of Wickam, per Curiam.

(a) Leaſe of the Land is a Suſpenſion of the Writ of Error for the Time. 1 Lev. 72. per Cur'.

1 Keb. 350. Bridg. 57. —But a Feoffment is an Extinguiſhment thereof. 1 Lev. 72. per Cur'. Vide Godb. 26. at the Top, 4 Leon. 135, 221. Palm. 247. 1 Co. 112. a. Bridg. 57. (b) Cro. El. 468, 469. S. C. and S. P. per Cur', Moor 413. pl. 569. adjudged, Owen 21, 22. S. C. and S. P. per Cur'.

11. If the Plaintiff in a Writ of Error be Nonſuit after the Error aſſigned, this is not any Bar of a new Writ of Error. 22 E. 3. 7. adjudged.

12. In a Writ of Error upon a Judgment in an Aſſiſe of Darrien Preſentment, it is not any Bar, that the Plaintiff was Nonſuit in another Writ of Error in the ſame Court; upon which a Writ to the Biſhop was awarded for him, for this Award of Execution was no Affirmance of the firſt Judgment. (c) 23 Aſſ. 8. adjudged.

(c) Br. Err. 121. S. C.

13. If an Infant brings a Writ of Error to reverſe a Fine levied by himſelf for his Nonage, and is inſpected by the Court and found within Age, which is recorded by the Court, and after before the Fine is reverſed, he levies another Fine to another; this ſhall bar him to have the Fine reverſed. M. 38, 39 El. B. R. (d) Hart's Caſe held, but there adjudged contra, for that the ſecond Fine was not pleaded.

(d) Noy 59. S. C. and ſaid the Fine was not pleaded, becauſe not ingroſſed, and the Ingroſſer was ſtaid on Purpoſe by the Conuſee.

14. If Tenant in Tail levies an erroneous Fine with Proclamations, and after levies another erroneous Fine with Proclamations, and dies, and the Iſſue in Tail brings a Writ of Error upon the firſt Fine; and the Defendant pleads in Bar the ſecond Fine, and after the Iſſue brings a Writ of Error upon the (*) ſecond Fine, and the Defendant pleads in Bar the firſt Fine by which the Right is bound; the Plaintiff may reply upon the firſt Writ that the ſecond Fine is erroneous, and upon the ſecond Writ that the firſt Fine is erroneous, and ſo ſhall be helped. M. 32 El. B. R. (e) Carington's Caſe per Curiam.

(*) Fol. 789.

(e) Bolton's Caſe. S. P. per Cur', cited. 1 Rol. Cro. El. 151. 2 Leon. 211. which by the Time ſeems to have been S. C. Moor 366. S. C. Rep. 306. S. C. cited. Vide Bridg. 77.

15. (f) In a Writ of Error brought by the Heir of the Conuſor of a Fine; it is a good Plea in Bar that the Conuſor after the Fine levied, ſuffered a Common Recovery, in which the Conuſor was vouched, and vouched over the Common Vouchee. *Mich.* 37 *and* 38 *El.* (g) *Berton's* Caſe. *Poph.* 100. adjudged *per tot' Cur'*, for ſuch Recovery with double Voucher, is a Bar, by Reaſon of the Voucher to every Manner of Right, which the Vouchee or his Heirs by Means of him is to have in the Land.

(f) Goulds. 181. S. P. admitted per Cur'.

(g) Cro. El. 388. S. C. adjudged. Moor 365. pl. 499. S. C. adjudged. Bridg. 76. S. C. cited, and vide Goulſ. 181.

16. A Releaſe of all Suits is a Bar of a Writ of Error. *Latch.* 110. *Cole's* Caſe, reſolved *per Cur'*.

17. In a Writ of Error to reverſe a Common Recovery, it is no good Plea that the Plaintiff pending the Writ of Error hath entered into Part; for before the Poſſeſſion was taken from him, he might have Error to reverſe the Judgment, though not to have Reſtitution. *Mich.* 14 *Car.* 2. between (h) *Winn* and *Lloyd.* 1 *Levin.* 72.

(h) 1 Keb. 351. S. C.

18. If a Writ of Error be brought to reverſe a Fine, the Defendant cannot plead that Fine, and five Years Nonclaim in Bar, for *non poteſt adduci exceptio ejuſdem rei cujus petitur diſſolutio. Mich.* 33 *Car.* 2. between (a) *Cockman* and *Farrer* adjudged, and ſaid, that where it is ſaid in 2 *Inſt.* 518. that a Fine in *Com. B.* of antient Demeſne Lands, is a Bar after five Years, to the Lords Writ of *Diſceit*; it muſt be intended another Fine, and not the firſt levied.

(a) 2 Jon. 181. S. S. adjudged.

(B) What ſhall be a good Bar.

1. IN a Writ of Error, it is a perpetual Bar that the Plaintiff hath purchaſed the Land in Fee after the Judgment. (b) 39 Aſſ. 18. 20 Aſſ. 2.

(b) Br. Err. 130. S. C.

2. In a Writ of Error, it is a good Bar during the Term, that the Plaintiff hath accepted from the Defendant a Leaſe for Years by Deed, of the Land after the Judgment. (c) 39 Aſſ. 18.

(c) Br. Err. 130. S. C.

3. In a Writ of Error by the King, it is no Bar that after a Judgment, certain Commiſſioners upon a general Commiſſion, have ſeiſed the Land for the King, for the King ſhall not be adjudged Tenant by the Seiſure of his Miniſters, but where it is for his Advantage. (d) 39 Aſſ. 18. adjudged.

(d) Br. Err. 130. S. C.

(C) In what Caſes a Bar of Part ſhall be of the Whole.

1. IN a Writ of Error to reverſe a Fine of ten Acres of Land, brought by one who was in Remainder in Tail; if the Defendant pleads in Bar a Common Recovery of Part of the Land, which is a good Bar as to that, yet this is no Bar as to the Reſidue; but the Court ſhall examine the Error in the Fine as to that. Mich. 10 Car. B. R. between (e) Done and Smethurſt, per Curiam; in a Writ of Error to reverſe a Fine levied in Cheſter. Intratur Tr. 8 Car. Rot. 1310.

(e) 1 Jon. 352, 353, 373. S. C. adjudged.

2. In a Writ of Error to reverſe a Fine, a Releaſe of Part is not any Bar as to the Reſidue; but the Court may reverſe the Fine as to the Reſidue. M. 10 Car. in Done and Smethurſt's Caſe aforeſaid per Curiam.

(D) (a) Er-

(D) (a) Error in (b) Parliament.

(a) 1 Rol. Abr. 753. pl. 9. 745. pl. 10, 14. for Precedents thereof, vide 4 Inſt. 22.

1. WHEN a Record comes in Parliament upon a Writ of Error, the King may aſſign certain Earls and Barons, and with them the Juſtices to determine the Matter. (c) 22 E. 3. 3.

(b) Returnable ad proxr' Parliament', not good, 1 Vent. 31. —Otherways if ſummoned, or prorogued to a Day certain, 1 Vent. 266. and vide 1 Sid. 413, 454. (c) For the Form of the Writ, vide Caſes of Parliament 12. Fitz. Err. 8. S. C. 2 Bulſt. 164. S. C. cited.

2. But they cannot reverſe the Judgment after the Parliament is ended, if they do it not before; for this ought to be done in Parliament. (d) 22 E. 3. 3.

(d) Fitz. Err. 8. S. C. 2 Bulſt. 164. S. C. cited.

If Judgment be given in *B. R.* either (e) upon a Writ of Error, or otherways, the Party grieved thereby may (f) upon a Petition of Right made to the King, in *Engliſh* or *French* (which is not *ex debito Juſtitiæ*, but for Decency) for that the former Judgment was given *coram Rege*) and his Anſwer thereunto, (g) *fiat Juſtitia*, have a Writ of Error directed to the Chief Juſtice of the King's Bench for removing the Record *in præſens Parliamentum*; and thereupon the Roll it ſelf, and a Tranſcript in Parchment is (h) to be brought by the Chief Juſtice of the King's Bench, into the Lords Houſe in Parliament; and after the Tranſcript is examined by the Court with the Record the Chief Juſtice (i) carries back the Record, and then the Plaintiff is to aſſign the Errors, and thereupon to have a *Scire facias* againſt the adverſe Party, either in that Parliament or (k) the next; and the Proceedings thereupon ſhall be *ſuper tenorem Recordi, & non ſuper Recordum*. 4 Inſt. 21.

(e) Moor 834. pl. 1122. Cro. Jac. 341. 2 Bulſt. 162, 163, &c. Godb. 250. 1 Rol. Rep. 14, 15, &c. (f) Moor 834. pl. 1122. (g) Moor 834. pl. 1122. (h) Cro. Jac. 341. Noy 76. Raym. 5. (i) When the Judgment is reverſed, the Tranſcript is returned in B. R. and the Record made according to the Tranſcript. Raym. 5. (k) That ſuch Writ of Error is determined by the Diſſolution of the Parliament. Cro. Jac. 342. 2 Bulſt. 163. Godb. 250. Noy 76. Raym. 5. but vide Raym. 383. 1 Vent. 31. But a Writ of Error does not determine by Prorogation, 2 Levin. 93. vide 1 Sid. 413, 454.

(E) How

(E) How a Court ſhall demean it ſelf.

Of what Error the Court ſhall take Conuſance without a Certificate upon a *Certiorari*.

1. If a Matter in Fact be pleaded in Bar of the Writ, as the Feoffment of the Plaintiff, or his Releaſe, and Iſſue is taken thereupon, and this is found for the Plaintiff; yet the Court may examine the Judgment, and if there be any Error in the Judgment, they may reverſe it. (a) 21 E. 3. 54.

(a) Fitz. Err. 74. S. C.

2. (b) If an Error be aſſigned in the Record, the Court is to view the Record if there be any other Error in it, and if there be, to reverſe it. (c) 24 E. 3. 34. b.

(b) 3 Bulſt. 229. S. P. per Cur'.

(c) Fitz. Office del Court, 25. S. C.

3. So if there be any Matter in the Record to affirm the Judgment, which is not pleaded, the Court may take Advantage thereof. (d) 24 E. 3. 34. b.

(d) Fitz. Office del Court. 25. S. C.

Fol. 790.

4. In a Writ of Error upon a Judgment in Banco, in an Action of Waſte by Default, and after a Writ of Inquiry of Waſte returned by the Sheriff according to the Statute, if it be not aſſigned for Error, that there was not any Attachment granted according to the Statute before the Diſtringas; but there are other Things aſſigned for Error: The Court cannot of themſelves, or by the Shewing of the Party reverſe the Judgment; becauſe by the Record certified, it does not appear that any Attachment was granted before the Diſtringas according to the Statute; for the Plea-Roll is (e) only certified upon the Writ of Error, which is before the Chief Juſtice, and the Proceſs appears upon the Philizer's Roll, which is not certified but upon Diminution alledged, and if he had aſſigned this for Error, it might have been certified, and therefore no Advantage ſhall be taken, becauſe it does not appear upon the Record certified. Mich. 10 Car. B. R. between Atkins and Higges adjudged, and the Judgment affirmed accordingly. Intratur Hill. 8 Car. Rot. 821.

(e) For what is certified upon the Writ of Error, vide 1 Rol. Abr. 752, 753, and the Notes there.

5. In a Writ of Error upon a Judgment in Banco, in an Ejectione firmæ, a ſhort Entry of the Writ, according to the Courſe there is certified, and then the Declaration at large, and by the Recital of the Writ, which mentions that the Action is brought de Rectoria de D. 20 acris terræ & 12 acris prati cum pertinentiis in D. and the Declaration is of a Leaſe by Indenture of the ſaid Rectory and Tenements, cum pertinentiis (excepta terra pro manſo Vicarii ibidem cum omnibus talibus eaſiamentis quales Vicarius ibidem adtunc habuit cum omnibus talibus decimis etiam prout idem Vicarius ante tunc habere uſus fuit & adtunc habuit & exceptis etiam & reſervatis jure patronatus & advocatione Vicariæ & Eccleſiæ parochialis de D. prædicta) and upon Not guilty pleaded, a Verdict and Judgment is given for the Plaintiff and aſſigned now for Error, that the Judgment was given for the Plaintiff, where it ought to have been for the Defendant; and after in nullo eſt erratum pleaded, it was moved for Error, that it appeared by the Record certified, that the Writ is general of a Rectory, and the Declaration of a Rectory with certain Exceptions: In this Caſe the Court ought not to reverſe the Judgment for this Cauſe, in as much

as it is not assigned for Error, nor the (a) Writ it self certified, so that the Court cannot take Notice that the Writ is as the Entry thereof is certified, and this Exception is but a Variance between the Writ and the Declaration; and perhaps this Exception in the Declaration was (*) but Overplus, and not Parcel of the Rectory, and then there was no need to have demanded the Rectory with a Forepriſe. And it ſeems it would not have been a good Plea for the Defendant in the firſt Action, to have ſaid that it appeared by the Declaration that there is a Forepriſe, &c. without an Averment thereof in Fact, that it is Part of the Rectory. Paſch. 11 Car. B. R. between Gregory and Shepherd adjudged in a Writ of Error, upon a Leaſe made by the Dean and Chapter of Peterborough. Intratur Hill. 11 Car. Rot. 41.

(a) For this vide 1 Rol. Abr. 753. pl. 8. and the Notes there.

(*) In the Original it is de Abundance.

6. In Debt, if Judgment be againſt the Defendant by Nihil dicit, and in a Writ of Error it is aſſigned, that there is not any Warrant of Attorney for the Attorney of the Plaintiff; but does not procure it to be certified upon a Certiorari as the Uſe is; and the Defendant in the Writ of Error pleads in nullo eſt erratum, yet this is not any Acknowledgment that there is not any Warrant of Attorney, but the Judgment ſhall be affirmed as if no ſuch Error had been aſſigned; for it is to be proved by the Record, and the Warrant of Attorney is no Part of the Record, (b) which was before the Chief Juſtice in Banco, to whom the Writ of Error was directed, and therefore it ought to be certified (c) upon a Certiorari, or otherways the Court ſhall not take Notice thereof. Mich. 13 Car. B. R. between Clutterbuck and Billing per Curiam adjudged, and the Judgment affirmed accordingly. Intratur Paſch. 13 Car. Rot. 185.

(b) There is nothing certified upon the Writ of Error, but what is with him, but the original

and judicial Writs remain with the Cuſtos Brevium, and other Officers; and are never certified, but when Error is aſſigned for want of them. Cro. El. 84. 1 Leon. 22. Cro. Jac. 479.

(c) Where ſuch Certiorari may be granted after in nullo eſt erratum pleaded. Vide 1 Rol. Abr. 764. M. 1, 2, &c.

7. In a Writ of Error upon a Judgment in Banco upon Demurrer, if * the Plaintiff aſſigns for Error, that there is not any Original of ſuch Term, in which the Action is commenced, and upon a Certiorari it is certified accordingly; and upon this the Defendant in the Writ of Error ſues a Certiorari, and upon this an Original is certified three Terms before; but no Continuation is certified between the Time of the Original and the Declaration, and ſo a Diſcontinuance: The Court ought to intend that there was not any Continuation between theſe Terms, and ſo a Diſcontinuance; for upon the Certificate of the Original (d) he ought to have procured the Continuances to have been certified, or otherways the Court cannot intend this to be the Original in this Action. Hill. 14 Car. B. R. between Rily and Hillman, adjudged in a Writ of Error upon a Judgment in Banco, and the Judgment reverſed accordingly for this Error. Intratur Tr. 14 Car. Rot. 399.

(*) Fol. 791.

(d) 3 Mod. 136.

(F) What Things ſhall be Errors.

(a) For this vide antea 1 Rol. Abr. 781.

1. If (a) the Writ be abateable, yet if no Exception be taken it is not Error. (b) 18 E. 4. 19.

(b) Br. Brief 383. S. C. Br. Error 176. S. C.

(c) Br. Brief 383. S. C. Br. Error 176. S. C.

2. Otherwiſe if the Writ be abated. (c) 18. E. 4. 19.

(d) 8 Co. 58. b. 59. a. S. P.

3. (d) If Aid be granted where it is not grantable, it is not Error. 18 E. 4. 16. b. 14 H. 6. 5. b. contra 7 H. 6. 21.

(e) It is Error to deny any Dilatory, where the Court ought to grant it. 8 Co. 59. a. 9 Co. 28. b. Hob. 46, 47.

4. Otherwiſe it is, if it be (e) not granted where it is grantable. 18 E. 4. 16. b. 14 H. 6. 5. b.

(f) 1 Rol. Rep. 450. S. C. adjudged, antea 1 Rol. Abr. 781. M. 2. S. C. Poſt 1 Rol. Abr. 869. pl. 12. S. C.

5. If an Action be brought againſt J. S. Knight and Baronet, and he appears and pleads, and Judgment is given againſt him and Execution done where he is not a Baronet, but only a Knight; yet he cannot aſſign this for Error againſt his own Acceptance (f) Markham and Sir Francis Forteſcue. P. 16 Jac. in Cam. Scac. adjudged in a Writ of Error.

(g) Br. Error 179. S. C.

6. If an Action be ſued by Prochein amy, ſuppoſing the Plaintiff to be within Age, when he is of full Age, this is Error. (g) 20 E. 4. 2. b. accordingly.

7. If A. S. brings an Action as Adminiſtratrix to J. S. her laſt Husband, and the Defendant pleads fully adminiſtred, and this is found by Verdict againſt him, and Judgment accordingly in the Writ of Error; he cannot aſſign Error in this, that J. S. her Husband is yet living, and ſo ſhe is a Feme Covert, and the Action does not lie, becauſe the Defendant hath by Plea admitted her to be a Feme Sole, and to be Adminiſtratrix of her Husband. Trin. 10 Car. in Camera Scaccarii adjudged in Writ of Error. Intratur 6 Car. B. R. Rotulo.

(h) Br. Attorney 79. S. C. Br. Error 184. S. C. but if ſuch Appearance was by Agreement of the Parties, (as will be intended by their pleading) 'tis no Error.

8. If a Man, upon a Cepi Corpus returned, appear by Attorney, this is Error. (h) 21 E. 4. 7. b.

(i) Br. Error 57. S. C. Fitz. Aſſiſe 48. S. C.

9. In an Aſſiſe againſt two, if the Tenants accept ſeveral Tenancies, and plead ſeveral Pleas in Abatement or Bar, if the Court inquires of any of the Pleas before it be inquired of the Tenancies, this is Error. (i) 11 H. 4. 68. contra 7 E. 4. 31. b. becauſe if the other had been inquired before, it might have been found that the other was Tenant, and ſo the ſecond Iſſue not to be inquired.

(k) Fitz. Aſſiſe 48. S. C.

10. So in an Aſſiſe, if the Tenant ſays that there is not any Tenant named, &c. and pleads over Null Tort, &c. if the Inqueſt inquires of the Diſſeſin, before it inquires of the Tenancy; this is Error for the Cauſe aforeſaid. (k) 11 H. 4. 68.

11. If

11. If the Mayor and Bailiffs of B. have Conuſance of Pleas, and one of the Bailiffs brings an Action, and the Defendant takes Exception that the Plaintiff is Judge, and notwithſtanding this they proceed, this is Error. (a) H. 4. 4. b.

(a) This ſhould be 2 H. 4. 4. b. which vide Br. Error 32. S. C.

12. In an Action of Debt in an inferior Court (b) upon a Bill Obligatory, if the Plea be entered (c) before the Debt becomes due by the Bill, ſcilicet, before the Time of Payment, and the Defendant pleads to Iſſue, and this is found for the Plaintiff and Judgment given accordingly; yet this is Error. Mich. 11 Caroli B. R. between Holden and Collet, adjudged in a Writ of Error upon a Judgment in Nottingham, and the Judgment reverſed accordingly. Intratur Hill. 10 Caroli, Rotulo 762. Hill. 11 Caroli B. R. between Walker and Wigfal adjudged in the Caſe of Treſpaſs, upon a Judgment in Cheſterfield, and between Marſhall and Wigfield. Intratur Trin. 11 Caroli.

Fol. 792.

(b) Eyles and Males like Point, Yelv 71. adjudged. Cro. Jac. 70. adjudged where the Plaint was entered before the Time of the Aſſumpſit laid in the Nar'. (c) Where the Plaint was entered the ſame Day the Words were ſpoke, and not held Error. Stil. 72. adjudged niſi.

13. If the Tenant appear by Attorney without Warrant of Attorney, this is Error. 11 H. 4. 88. b. (d) 7 H. 4. 16. (e) 11 H. 4. 44.

(d) Br. Error 37. S. C.
(e) Fitz. Judgment 71. S. C.

14. (f) In an Action upon the Caſe for ſcandalous Words, the Plaintiff declares that the Defendant ſpoke the Words 1 Die Junii 12 Caroli, and the Original bore Teſte after the ſaid Time that he alledged the ſaid Words to be ſpoke; this is Error, for though the Day is not material, (g) yet when he lays it, it ſhall be intended to be true, and if it was ſo in Truth, then the Action was brought before any Cauſe of Action. Paſch. 15 Caroli B. R. between Colly and Oliver, per Curiam adjudged, and the Judgment given in Banco reverſed accordingly. Intratur Mich. 14 Caroli Rotulo 154. and Hill. 15 Caroli B. R. between (h) Smith and James adjudged in a Writ of Error upon a Judgment in Banco. Intratur Mich. 14 Caroli Rotulo 499.

(f) Buckly and Williamſon like Point Cro. El. 325. Moor 598. pl. 818. adjudged upon a Writ of Error upon a Judgment after a Verdict in Debt, where the Teſte of the Original was before the Day of Payment in the Condition of the Bond, upon which the Action was brought, and vide Cro. El. 565. (g) It is regularly true that if the Plaintiff will himſelf diſcover to the Court any Thing, whereby it may appear that he had no Cauſe of Action when he commenced it, his Writ ſhall abate. Hob. 199. Palm. 524. — Otherwiſe where it appears by the Allegation of the Defendant. Cro. El. 111. 2 Leon. 20. 1 Leon. 87. (h) Cro. Car. 575. S. C. adjudged.

15. If by Matter ſufficient it appears to the Court for the King, for which they ought not to proceed in loquela Rege inconſulto, if they proceed in loquela, without a Procedendo in loquela, and after upon a Procedendo ad judicium they give Judgment, the Proceeding in loquela without the Writ, is erroneous. 9 H. 6. 41. Curia.

16 In Treſpaſs for breaking his Houſe and Garden, if the Defendant pleads Not guilty to the Garden, and after pleads a Licenſe to enter into it, and Iſſue is taken (i) upon the Whole, and it is found againſt the Defendant, this is good, and the Plaintiff

(k) So if Iſſue be taken upon one Part of a double Plea, it makes it good. Jenk. Rep. 21. 1 Rol. Rep. 112. Kelw. 37. Poph. 113.

ſhall

shall have Judgment; for this is but a (a) double Plea and double Iſſue, and both found againſt the Defendant. Mich. 14 Car. B. R. between Breſey and Lapworth adjudged, this being moved in Arreſt of Judgment. Intratur Trin. 14 Car.

(a) But where and how a double Plea may be ſolved, vide under the Title Duplicity, under the general Title of Pleading.

17. If no Pledges (where they ought to be found) (b) are returned by the Sheriff, nor found pending the Writ, and after Judgment is given; (c) this Want of Pledges at the Common Law, made the Judgment erroneous. My Reports 14 Jac. (d) Dr. Huſſy againſt Moor adjudged. Paſch. 3 Jac. B. R. between Randal and Higgins adjudged.

(b) But where the Want of Pledges being returned upon the Original, or entered upon any Bill, is helped, vide 16 & 17 Car. 2. Pop. 8. 4 & 5 Ann. c. 16. (c) Where the Want of finding Pledges was Error at Common Law, vide Havert and Gibbons. 1 Rol. Rep. 205. 3 Bulſt. 61. Wolf and Pole Cro. Car. 91. Hut. 92. Hetl. 59. Lit. Rep. 72. Cro. Jac. 319. Noy 121. March 17. 1 Sid. 84. — But where a Replevin is removed in B. R. and no Pledges de retorn' habend' found according to the Statute; yet this does not make the Proceedings erroneous; but an Action lies againſt the Sheriff. 1 Jon. 440. but for this vide 2 Rol. Abr. 259. pl. 3. and the Notes there. Cro. Car. 594. 3 Mod. 57. and vide Hut. 77. — Where upon a Venire, no Pledges were returned for the Jury, and it was held a defective Return, and helped by the Statute of Jeofails. 2 Rol. Rep. 87. — But where upon Error, the Want of Pledges was aſſigned, and the Sheriff was after ſuffered to amend his Return. 3 Levin. 345. Raym. 51. (d) Cro. Jac. 414. S. C. adjudged. 1 Rol. Rep. 445, 446. S. C. adjudged. 3 Bulſt. 281. S. C. adjudged. Hob. 101. S. C. adjudged. 1 Jon. 439. S. C. cited. Cro. Car. 594.

18. If a Replevin be brought in the Country, and this is after removed by Recordari in Banco, and there the Parties plead, and Judgment is given upon Demurrer for the Plaintiff, tho' no Pledges are returned, or found, pending the Suit; yet this is not erroneous, becauſe it was not required upon the Plaint in the Country to find Pledges, as it is in the Caſe of an Original, and the Sheriff when he made Deliverance, took Pledges for his Indempnity. Trin. 9 Car. B. R. between Randal and Score adjudged in a Writ of Error upon a Judgment in Banco, this being aſſigned for Error. Intratur Paſch. 8 Car. Rot. 422.

19. But Paſch. 15 Car. B. R. between (e) Groſſe and Boſcawen, ſuch Exception was taken in Arreſt of Judgment, and per Curiam held erroneous; but Pledges were permitted to be put in, (f) in as much as it was before the Judgment, and ſo pending the Suit, and ſo it was helped.

(e) 1 Jon. 439. S. C. and S. P. per Cur'. March 46. S. C. and S. P. per Cur'.

(f) At what Time Pledges may be found, vide 2 Rol. Abr. 259.

(G) (a) Error in Proceſs.

Fol. 793.

(a) For this vide through-out Title Amendment in my firſt Part.

1. If there be an Omiſſion of any Writ in Proceſs, or one Writ awarded in lieu of another, and Judgment given thereupon without any Appearance of the Party, this is erroneous. (b) 3 H. 6. 9.

(b) 1 Rol. Abr. 779. pl. 3. S. C. vide and the Notes there.

2. In Debt, if there be but two Capias's awarded, and then an Exigent, this is erroneous. 3 H. 6. 9.

3. If a petit Cape be awarded in lieu of a grand Cape, and the Demandant recovers thereupon, this is erroneous. 3 H. 6. 9.

4. In Debt, if a Capias be awarded before any Summons, and Judgment after given, this is erroneous; for there ought to be a Summons awarded by the Law, before any Capias ought to Iſſue. Paſch. 3 Jac. B. R. between (c) Banks and Pembleton adjudged in a Writ of Error. Paſch. 5 Jac. B. R. between (d) Ballard and Cook adjudged, which intratur Trin. 4 Jac. Rot. 681. Hill. 4 Jac. B. R. between (e) Moyle and Catchnud adjudged, which intratur Trin. 4 Jac. Rot. 1609.

(c) My ſecond Part 431. pl. 11. S. C. 2 Rol. Abr. 277. D. 2. S. C.

(d) My ſecond Part 431. pl. 11. S. C.

(e) My ſecond Part 431. pl. 11. S. C.

5. In a Præcipe quod reddat, if the Tenant before the Statute of 31 El. (f) be returned ſummoned; where no Summons was made, and upon this the Tenant loſes by Default, yet this Nonſummons is not erroneous, for the Juſtices have given a good Judgment, and the Party cannot aver againſt the Return in a Writ of Error upon the ſame Judgment. Hill. 37 El. B. R. between (g) Collet and Marſhall.

(f) But if the Sheriff had not returned the Names of the Summoners and Viewers, it was Error; for if no Summons was made, the Party could not have a Writ of Diſceit & non conſtat de Recordo, againſt whom he ſhould have it. Merrill and Robins, Cro. El. 557. Moor 459. pl. 635.

(g) Cro. El. 371, 397. S. C. and S. P. per Cur'. Moor 349. pl. 467. S. C. My ſecond Part 543. pl. 1. S. C.

6. (h) So it is not erroneous by the Statute of 31 El. cap. 3. if he was not ſummoned according to that Statute. Hill. 37 El. B. R. between (i) Collet and Marſhall adjudged. Vide the Statute.

(h) Noy 22. S. P. cited to be adjudged.

(i) Cro. El. 371, 397. S. C. adjudged per tot' Cur'; con' Gaudy, Moor 349. pl. 567. S. C. adjudged. Gouls. 128. S. C. adjudged.

7. In an Action upon the Caſe, if the Plaintiff declares that A. was indebted to him in 10 l. and he exhibited a Plaint in the Court of Exeter ſecundum conſuetudinem, and upon this a Capias was awarded againſt A. ſecundum conſuetudinem, and upon this A. was arreſted, and thereupon the Defendant promiſed that in Conſideration the Plaintiff vellet permittere A. to go at large, and not farther to proſecute the ſaid Plaint, he aſſumed to redeliver A. again to the Cuſtody of the Serjeant that arreſted him before ſuch a Day, or otherways to pay; and avers that he ſuffered him to go at large, &c after a Verdict upon Non aſſumpſit pleaded, and Judgment for the Plaintiff, it was aſſigned for Error, that the firſt Proceſs againſt A. was a Capias without any Summons, yet the Judgment was affirmed; but no Body was of the other Part, to ſhew to the Court, that in this Caſe A. never appeared to the Plaint, ſo that he never made the Proceſs good by any Appearance. Trin. 8 Car. B. R. between Hawkins

kins and Snelling adjudged in a Writ of Error, upon a Judgment in Exeter. Intratur Trin. 7 Car. Rot. 630.

8. If one indicted of Felony be rendered, and hath a Superſedeas, and delivers it to the Sheriff before the Exigent is pronounced and returned, if the Exigent be after pronounced and returned, it is erroneous. 18 E. 3. 38.

9. So if he never delivers it to the Sheriff, yet the Exigent is erroneous; for this loſt its Force by the Render and Superſedeas. Contra 18 E. 3. 38.

10. If the King pardons him pending the Exigent, and notwithſtanding the Sheriff pronounces the Exigent, it is erroneous. 18 E. 3. 38.

11. If an Action of (a) Dower, by Way of Plaint and not Writ, be brought in an inferior Court (b) by the Cuſtom of the Court, and the Plaintiff thereupon recovers by Judgment, this is erroneous; becauſe it is (c) againſt the Statute of Magna Charta, to ſue by Plaint in a real Action. Hill. 11 Car. B. R. between Hodgſon and Cremer per Curiam, in a Writ of Error upon ſuch (*) Judgment in Lynn, and the Judgment reverſed for this Cauſe among others. Intratur H. 11 Car.

(a) Whether a Formedon can be maintained by Cuſtom in an inferior Court, Cro. El. 101. vide.

(*) Fol. 794.

(b) Lomax and Armorer, a like Judgment reverſed, no ſpecial Cuſtom being laid. 2 Levin. 98, 123. doubted per Hale, whether the Judgment would have been good, if a Cuſtom had been alledged; but he ſaid that Aſſiſes of freſh Force were brought by Cuſtom in other Places, as well as London, tho' their Cuſtoms not confirmed by Parliament, 1 Vent. 267. not determined whether it might be good by Cuſtom. Raym. 233. 1 Keb. 277, 326, 421. S. C. (c) Vide 2 Inſt. 311.

12. In an Action of Debt in an inferior Court, if the Summons be awarded, and after a Capias, and upon this a Cepi returned, and the Record is returned in a Writ of Error, that at the Return of the Cepi quod Defendens venit & comperuit, and thereupon two others came in their proper Perſons, and became Bail for him; and after a Day is given to the Defendant till another Court, at the Prayer of the Plaintiff, and no Mention of any Prayer or Imparlance of the Defendant; and at the other Court he makes Default, and upon this Judgment is given by Default againſt him; this is erroneous, becauſe the Record is not that he appeared in proper Perſon, or by Attorney; for the Clerks de B. R. ſaid, that it is uſed always to be ſaid, that he appeared in proper Perſon, or by Attorney or Guardian; for a Man may appear by any of theſe Ways. Mich. 15 Car. B. R. between Orchard and Jenkins adjudged in a Writ of Error upon a Judgment in Briſtol, and the Judgment reverſed accordingly for this Error. Intratur Mich. 14 Car. Rot. 194.

13. In a Writ of Covenant between Foſter and Foſter, the Commiſſioners upon the Dedimus having taken the Conuſance, return Executio iſtius Commiſſionis patet in quodam panello huic commiſſioni annexo, where it ought to be in quadam Schedula; yet this is not erroneous in the Fine, for this had been well, if it had been only executio patet in hac annex', without other Words; and ſo it was ſaid, it would have been good, if no Words had been Writ thereupon, but had only returned the Concord under their Seals. Trin. 4 Jac. B. R. (d) between the Earl of Bedford and Foſter adjudged in a Writ of Error.

(d) Cro. Jac. 77. S. C. adjudged.

14. So in the ſaid Caſe, if in the Label annexed to the Præcipe, it is there recited the Parties are named Foſter and Foſter without naming their Chriſtian Names, and in the Concord their Chriſtian Names are named; yet this is not erroneous, for not naming their Chriſtian Names in the Præcipe, for the Reaſon in the Point before. Trin. 3 Jac. B. R. (e) between the Earl of Bedford and Foſter adjudged in a Writ of Error.

(e) Cro. Jac. 77. S. C. but S. P. does not appear.

15. So

15. So in this Caſe, if in the Label the Præcipe be de 8 Meſſuagiis & 2 Meſſuagiis, and the Concord is well, ſcilicet, 2 Meſſuagiis & 2 Toftis; yet this Variance is not Error, becauſe the Præcipe in the Label is not neceſſary, but idle; for the Concord is in the Writ of Covenant, which is the material Thing, and the other but Surpluſage; for the Juſtices who take Fines never return upon their Dedimus, more than only the Concord. Trin. 3 Jac. B. R. between the Earl of (a) Bedford and Foſter adjudged in a Writ of Error.

(a) Cro. Jac. 77. S. C.

16. (b) If the Dedimus poteſtatem to take the Conuſance of a Fine, bears Date (c) before the Writ of Covenant, this is Error; for the Dedimus poteſtatem ſays, ſcilicet quod cum breve pendeat de placito Conventionis, &c. and this cannot be pending, when it bears Teſte after. Hill. 42 El. B. R. adjudged in a Writ of Error. Brook 35 H. 8. 262. 1 H. 7. 9. Fitz. Nat. 146. G. Hill. 10 Car. B. R. between (d) Herbert and Benion, per Curiam intratur.

(b) Cro. El. 740. S. P. adjudged but vide Cro. El. 275. 1 Rol. Rep. 223. (c) But it may bear the ſame Date, or after before the Return of the Writ of Covenant; for the Writ of Covenant may be ſaid to be depending before the Return, Arundel and Arundel. Cro. El. 677. Cro. Jac. 11. and vide Cro. El. 275. (d) Cro. Jac. 392. S. C. Moor 847. pl. 1148. S. C. 3 Bulſt. 134. S. C. 1 Rol. Rep. 250, 223. S. C. by the Report of which Books this being aſſigned for Error, the Parol demurred for the Infancy of the Defendant in Error, who after coming of Age, a Reſummons was granted, as appears in 1 Jon. 419, 420. and the Caſe appeared as follows herein in Placito 20. vide.

17. Vide Mich. 43, 44 El. B. R. between (f) Arundel and Arundel contra, Hill. 13 Jac. B. R.

(f) Cro. El. 677. S. C. Cro. Jac. 11. S. C. Yelv. 53. S. C.

18. If the Dedimus poteſtatem be to take the Conuſance of Lands, Tenements and Rents, and no Conuſance is made of the Rent, and ſo the (g) Dedimus not purſued in the Whole; yet this is not erroneus. Mich. 43, 44 El. B. R. between (h) Arundel and Arundel per Curiam.

(g) But if a Dedimus poteſtatem be granted to two, and the Fine taken by one only, this is Error. Cro. El. 240. Yelv. 34. — But where a Dedimus is to take the Conuſance of four, and the Conuſance of three only is returned; how this may be made good, vide Cro. El. 576, 577, and vide 2 Sid. 94, 96. and Poſt under Title Fines. (h) Cro. Jac. 11. S. C. adjudged, the Dedimus being to take the Conuſance of a Manor, twenty Acres of Land, and 40 s. Rent: And Popham ſaid, where a Fine is of a Manor, and Rent under 5 l. it was the Courſe of the Fine-Office, not to mention the Rent in the Fine, and vide Cro. El. 275.

19 If the Writ of Covenant bears Teſte 23 Jan. and the Dedimus poteſtatem the 24 Jan. and the Writ of Covenant is returnable Octabis (*) Purificationis, which is the 12th of February; and the Caption of the Fine taken before Gawdy Juſtice is the 14th of February, and ſo certified upon the Back of the Dedimus poteſtatem; ſo that the Caption is after the Return of the Writ of Covenant, yet this is erroneous. Trin. 5 Jac. B. R. Mich. 5 Jac. B. R. between (i) Champernon and Godolphin. Dubitatur Mich. 5 Jac. B. ſame Caſe per Curiam.

(*) Fol. 795.

(i) Cro. Jac. 160. S. C. but S. P. does not appear. Hut. 135. S. C. vide.

20. If upon a Fine levied at the Grand Seſſions in Montgomery, the Record in the Writ of Error is certified, that A. brought a Writ of Covenant againſt B. &c. and that this bore Date 8 Julii, 7 Jac. and it is alſo certified, that a Dedimus poteſtatem was granted between the ſame Parties, and of the ſame Premiſes which bore Date before, ſcilicet, 6 Feb. 2 Jac. in which it is recited quod cum breve noſtrum de Conventione pendet, and the Indorſement of the Execution thereof is certified, ſcilicet Executio patet in quadam ſcedula huic annexa, and after there is certified a Præcipe between the Parties, &c. and the Concord thereupon & captio & cognitio 18 Feb. 2 Jac. coram nobis, &c. virtute brevis de dimus poteſtatem huic concordiæ annexi

annexi, and after it is certified hæc eſt finalis concordia facta, &c. prædicto die Lune 24 Julii, 7 Jac. and proclaimed then, and the Writ of Error is brought to reverſe this Fine, which was levied at a grand Seſſions held die Lunæ 24 Julii, 7 Jac. and aſſigns for Error that the Dedimus poteſtatem bore Date before the Writ of Covenant; but whether in this Caſe it ſhall be intended by the Court, that this Fine was levied upon the Conuſance upon the Dedimus poteſtatem, or after in Court, is the Queſtion; the Conuſance upon the Dedimus being 2 Jac. and the Writ of Covenant and Fine perfected 7 Jac. Hill. 10 Car. B. R. between (a) Herbert and Benion, dubitatur, J. being for the Defendant in Error; but ſome of the Judges ſaid, that this cannot be a Fine levied in Court, becauſe there are not the Parts of ſuch Fine, without that which was done upon the Dedimus poteſtatem. But Trin. 14 Car. it was argued by Berkly and Croke that it was not Error, becauſe it ſhall be intended to be levied in Court: But Mich. 14 Car. it was argued by Jones, who ſeemed econtra; for that this could not be in Court, being that there was but one Concord certified, and this appeared to be taken in the Country before Commiſſioners, and not in Court; and the Concord is ſuch an eſſential Part of the Fine, that it is not good without it; and if there was another Concord in Court, there might be a Diminution alledged, and thereupon to have it certified upon a Certiorari, otherwiſe ſuch thing which could not be, unleſs it be of Record, ſhall not be intended if it do not appear to the Court by the Record it ſelf, and after, Hill. 14 Car. Brampſton was of the ſame Opinion with Jones, and ſo the Court divided.

(a) Cro. Jac. 392. S. C. 1 Rol. Rep. 250, 323. S.C. Moor 847. pl. 1148. S.C. 3 Bulſt. 134. S. C. by the Report of which Books, after this being aſſigned for Error, the Defendant in Error had his Age. 1 Jon. 419, 420. being of Age, a Reſummons was granted, and the Court divided.

21. In a Writ of Error in Banco, or Banco Regis, upon a Judgment given in an inferior Court, if the Stile of the Court be entered in this Manner, Coram J. S. Majore, and the Burgeſſes Burgi prædicti, and does not ſay, ſecundum conſuetudinem villæ prædictæ, this is erroneous, (b) for it ought to appear to the Court, where the Record is removed by Writ of Error that they have Power to hold Plea by Preſcription, or by Letters Patent of the King. Mich. 38, 39 El. B. R. between (c) Holman and Collins adjudged.

(b) For this vide Moor 601. pl. 830. Godb. 380. Cro. Jac. 184, 493, 532. Yelv. 46. 2 Mod. 197. Stile 131.

(c) Cro. El. 489. S. C. adjudged. Moor 422. pl. 588. S. C. adjudged. Owen 50. S. C. adjudged. Noy 35. S. C. adjudged.

22. If the Plaint (d) in an inferior Court be in Placito tranſgreſſionis ſuper Caſum, and the Declaration is in Placito debiti, and the Judgment is given thereupon for the Plaintiff; this is erroneous. Hill. 10 Car. B. R. between Bowman and Hixſon per Curiam, and ſuch Judgment given at St. Albans reverſed accordingly. Intratur Mich. 10 Car. Rot. 34.

(d) The Plaint may be general, without mentioning any Sum. Stil. 86. —Where the Plaint was in Debt for 14 l. and the Count for 12 l. Billingham and Wabiſor. 1 Vent. 6. 2 Keb. 590. and vide Stile 115, 244.

23. (e) If a Man declares in an inferior Court in an Action againſt J. S in Cuſtodia de J. D. Serjeant and Miniſter of the Court, this is not good, without any Averment that he took him in Cuſtody by Force of the Precept, or Proceſs of the Court, or ſuch like. Trin. 1649. between (f) Lawe and Doddeſworth adjudged in a Writ of Error, upon ſuch Judgment in (*) the Court of York (as it ſeems) and the Judgment reverſed accordingly, where the Defendant demurred there upon the Declaration for this Cauſe, and this overruled, and Judgment given there againſt him.

(e) Cro. El. 489. like Caſe, where it did not appear that the Defendant came in by Attachment, or that he declared againſt him ſub Cuſtodia, &c. but only A. queritur verſus B. de placito tranſgr', &c. & ſunt plegii de proſequend', J. D. & R. R. & unde id. A. queritur quod cum, &c.

(*) Fol. 796

(f) 1 Rol. Abr. 780. pl. 9. S.C.

24. In a Formedon in Diſcender, if the Demandant counts that A. gave it to B. in Tail per quod B. was ſeiſed ut de feodo & jure per formam, &c. this is good and not erroneous, though the Words ſeem to imply that he was ſeiſed in Fee; for in as much as he ſays per formam, &c. it ſhall be intended a Fee per formam doni, which is in Tail, and this is the uſual Count. Hill. 10 Car. B. R. between Cowpe and Turner per Curiam, adjudged in a Writ of Error. Intratur Hill. 9 Car. Rot. 253.

25. In an Action of Debt in Banco, if the Plaintiff declares, and does not ſay after, as is uſed in Banco Regis, & petit quod Defendens reſpondeat; but thereupon Judgment is given againſt the Defendant, upon non ſum informatus, tho' it was ſaid that the Court ought not to give Judgment for the Plaintiff without his Prayer, as not to increaſe the Coſts without the Requeſt of the Plaintiff; yet this is not erroneous, becauſe the Bringing the Action is a Demand of it ſelf, and this is the Uſe de Banco, to enter the Judgment ſo without ſuch Prayer. Paſch. 11 Car. B. R. between Preen and Keel adjudged, and the Judgment given in Banco affirmed accordingly. Intratur Hill. 10 Car. Rot. 907.

26. If an Infant appear by Attorney, where he ought to appear by Guardian, this is erroneous. Mich. 15 Jac. B. R. between (a) Weſtcot and Cotne adjudged per Curiam, and a Judgment reverſed for this Cauſe. Co. 8. Beecher 58. b. Co. 9. Ab. Str. Mar. 30. 1 H. 5, 6. 22 H. 6. 31. b.

(a) Cro. Jac. 420, 441, 442. S. C. adjudged. Poph. 130. S. C. adjudged. 1 Rol. Rep. 380. S. C. and S. P. admit; my firſt Part 602. pl. 2. S. C. which vide and the Notes there.

27. Mich. 11 Car. B. R. between Scawen and Arundel, a Judgment given in a Common Recovery, in which the Tenant being an Infant appeared by Attorney, reverſed per Curiam, in a Writ of Error. Intratur Trin. 11 Car. B. R. Rot. 315.

28. (b) In an Action upon the Caſe, if the Judgment be given by nihil dicit againſt the Defendant, and the Record is quod Defendens per with a Blank, attornatum ſuum venit & defendit vim, &c. & nihil in barram dicit, &c. this is erroneous, becauſe there is not any Attorney named. Mich. 13 Car. B. R. between Chapman and Chaundler per Curiam, a Judgment in Banco reverſed for this Cauſe. Intratur Hill. 12 Car. Rot. 310.

(b) Newſon's Caſe. S. P. 1 Rol. Rep. 336, 381. adjudged. 3 Bulſt. 202. adjudged. My firſt Part, 606. pl. 3. which vide and the Notes there, and Cro. El. 75, 545.

29. If a Clerk in Chancery declares there by Bill, by Force of his Privilege, he being within Age, and not by Guardian, and after he comes of full Age, and after they plead to Iſſue, and after it is tranſmitted in Banco Regis, and there Judgment is given for the Plaintiff after a Verdict for him; this is erroneus, (c) becauſe he did not appear by Guardian, for if it ſhould be admitted he appeared in proper Perſon and declared, and not by Attorney; yet it is erroneous, for it is more dangerous for an Infant to appear in Perſon than by Attorney, becauſe if an Attorney defrauds him, an Action lies againſt him, but if he appears in Perſon, there is no Remedy againſt any one. Trin. 1650. between (d) Dawks and Peyton adjudged per Curiam, and the Judgment reverſed accordingly, for this Error. Intratur.

(c) For this vide 2 Inſt. 390. my firſt Part. 602. pl. 3.

(d) Stil. 216, 218, S. C. adjudged, but being after Verdict, it was ſaid by Hales to be helped by 21 Jac.

(a) Cro. El. 638. S. P. adjudged. Cro. Jac. 111. S.P. adjudged. 2 Br. 118. S.P. adjudged. but vide 2 Leon 59, 189.

30. (a) If a Woman recovers in a Writ of (b) Dower against an Infant by Default, this is not erroneous; for the Parol shall not demur in this Writ. Trin. 4 Jac. between Eppes and Eppes adjudged. Hill. 41 El. B. R. between (c) Williams and Williams per Curiam:

(b) Otherwise of a Recovery in other Actions. Bendl. pl. 7. 2 Inst. 484, 485. 2 Rol. Rep. 16. (c) Cro. Eliz. 557, 567. S. C. adjornat', Moor 342. pl. 465. S. C. and said the Court seemed inclinable it was no Error, because not an Action in which the Infant could have his Age. Cro. Jac. 392. S. C. cited. Moor 847. S. C. cited. 2 Rol. Rep. 326. S. C. cited.

(d) 2 Inst. 483, 484, S.P. con'.

31. (d) If a Recovery be had by Default in a real Action against one in Prison, it is Error. *Litt. Sect.* 438. for he shall have no Writ of *Disceit*, because the Summons was according to Law, by Summoners and Veiors, and the Lands taken into the King's Hand by the Pernor. *Co. Lit.* 259. *b.*

Fol. 797.

(H) What Things shall be Error in the Name of the Jurors, or Parties.

1. If J. Brook be returned upon the Venire facias to try the Issue, and J. Brook is sworn and tries it with others; yet this is good without any Amendment, or Examination whether he be the same Person; for though it was objected that the Names of Men have their Denomination, some of their Trade, and some of the Place where they inhabit, and then here Broke and Brook, scil. a River differ, yet the Court would not intend it, and they are (e) idem sonantia, and therefore good. Mich. 9 Car. B. R. between the King and Jennings, in a Writ of Error upon a Judgment in a Quare impedit in Banco.

(e) My first Part 333. pl. 21, 24.

(I) What

(I) What Things ſhall be Errors in Proceſs, or Execution thereof.

1. If an Habeas Corpus iſſues tempore Regis Jac. to have the Jury ſummonit' in Curia nuper Reginæ, and after the Diſtringas was to diſtrain the Jury ſummonitos in Curia noſtra, this is erroneous; for the Jury cannot be ſummoned upon other Writ than the Venire facias, for after by the other Writs they are attached and diſtrained. Trin. 3 Jac. B. R. between (a) Knowles and Burtenſhaw.

(a) Cro. Jac. 89. S. C. My firſt Part, 333. pl. 18. S. C. which vide with the Notes there.

2. If the Bail ſues an Audita querela, and a Scire facias thereupon, which recites the Audita querela and the Capias againſt the Principal, and the Return thereupon, which Capias was awarded tempore Reginæ El. and the Scire facias is recited to be per breve Dominæ Reginæ Angliæ Vicecomiti noſtro de S. direct', which is to the Sheriff of the King which now is; this is Error by the Common Law, but is now amendable. Paſch. 3 Jac. B. R. between (b) Barns and Worlich admitted.

(b) My firſt Part, 333. pl. 19. S. C.

3. In a Writ of Dower de tertia parte 1 Meſſuagii 1 Stabuli 1 Horrei, &c. if the Defendant pleads ne unque ſeiſie que Dower, upon which they are at iſſue, and at the Niſi prius the Tenant makes Default, and a Petit Cape is awarded, and the Sheriff returns quod cepit in manus tertiam partem 1 Meſſuagii 1 Horrei, &c. but makes no Mention of the Stable, and upon this Judgment is given for the Stable, as well as for the reſt; this is erroneous. Mich. 10 Car. B. R. between (c) Taſh and Hamets per Curiam, in a Writ of Error upon a Judgment in Banco. Intratur Mich. 9 Car. Rot. 420. and adjudged alſo that this cannot be amended.

(c) 1 Jon. 397. S. C. adjudg'd.

4. If the Sheriff of a County levies a Fine, and in this the Writ of Covenant is directed to the Coroners, becauſe it was brought againſt the Sheriff himſelf, and this is returned by them, and upon this the Fine levied; this is not erroneous, though there cannot be any Favour in the Execution of an original Writ. Hill. 10 Car. B. R. between (d) Done and Smethurſt dubitatur, this being aſſigned for Error upon a Fine levied in Cheſter. But Mich. 11 Car. adjudged per totam Curiam, that this is not erroneous; but that properly it ought to be awarded to the Coroners, becauſe the Sheriff is Party; as the Uſe is in ſuch Caſe, as was certified by the Curſitors. Intratur 8 Car. Rot. 1310. and the Judgment in Cheſter affirmed accordingly.

(d) Cro. Car. 415, 416. S. C. adjudged. and ſaid the Defendant appearing and levying a Fine thereupon, ſhall never after aſſign it for Error. 1 Jon. 373. S. C. adjudged.

5. If a Judgment be given by Nihil dicit in an inferior Court, held before the Steward by Letters Patents within Time of Memory, the Writ of Inquiry of Damages ought to be awarded returnable in Court, to be inquired (e) there, unleſs ſpecially otherwiſe declared by the Letters Patents, ſcilicet, that the Bailiff of

(e) Where the Writ was to the Serjeant to inquire, &c. returnable in Court, where the Inquiry was made, &c. and held Error, becauſe the Inquiry was not warranted by the Writ. 1 Brownl. 203. Yelv. 69, 70.

the Court, or other Officer shall inquire; (*) for otherwise the Bailiff shall take an Oath upon the Inquiry without express Authority. Trin. 14 Car. B. R. between (a) Worsely and Metcalf dubitatur, Croke Contra Berkly; intratur Trin. 13 Rot. 561. in a Writ of Error upon a Judgment in Eshetisford; but they agreed that the Sheriff might, because he is an Officer known and sworn, and so in divers inferior Courts by Prescription, the Serjeant or Bailiff may. But Mich. 14 Car. the Judgment was reversed per Curiam for this Cause.

(*) Fol. 798.

(a) My second Part, 257, pl. 2. S. C.

6. If a Man be indicted of Barretry before the Justices of Peace, and the Record is ideo venit inde Jurata, &c. and the Jury returned per W. and L. and it does not appear whether they were Sheriffs, or had Authority to return it; yet this is good, being in Denbigh. Trin. 15 Car. B. R. between the King and Banister in a Writ of Error per Curiam, but adjourned for Precedents; but this was after reversed for other Cause; but per Curiam, this is no Error.

7. Upon an Issue joined in an inferior Court, if a Venire facias be awarded to the Officer quod venire faciat 12 de vicineto, &c. duly, and the Officer returns Præceptum prædictum cum panello annexo, & quod fuit servitum secundum exigentiam warranti; but it does not appear what were the Names of the Jurors, nec quot fuerunt, scilicet 12. or other Number, this is not good. Hill. 14 Car. B. R. between Whitrow and Edmond per Curiam, and Judgment given in Kingston upon Thames, reversed for this Cause. Intratur Mich. 14 Car. Rot.

8. Upon Not guilty pleaded to an Indictment of Barretry, before the Justices of a Borough Hill, that hath Power by Charter to hold a Sessions, a Venire facias is awarded, and the Record is, & Juratores inde prædicti per A. & B. tunc Ballivos Burgi & Villæ predict' impannellati exacti quidam eorum videlicet, &c. venerunt, &c. and thereupon there is a Verdict and Judgment; this is erroneous, for that it may be that these Bailiffs were Bailiffs of the Hill for other Purposes; as to collect their Rents, and such like, and not Ministers of the Court; for it ought to be by A. and B. Bailiffs and Ministers Curiæ præd' Pasch. 16 Car. B. R. Bannester's Case adjudged per Curiam, and a Judgment in Denbigh reversed accordingly in a Writ of Error.

9. If a Distringas issues, and also apponere thereto decem Tales, this is erroneous, for the decem Tales cannot be put thereto, but to the first Jury summoned by the Venire facias. Trin. 3 Jac. B. R. between (b) Knowles and Burtenshaw adjudged.

(b) My first Part 333. pl. 18. S. C. which vide with the Notes there.

10. If an Issue be joined in an inferior Court, that hath Power to hold Court from Week to Week, and the Court awards a Venire facias, returnable the same Court, and thereupon a Jury is returned, and the Issue tried the same Court; this is erroneous. Trin. 14 Car. B. R. between Morgan and Bodington adjudged, and the Judgment reversed accordingly. Intratur Hill. 13 Car. Rot. 1022.

11. In an Action upon the Statute de R. against three, and after Issue one dies, and notwithstanding Process is awarded against all three, scil. against him that is dead and the others, and upon a Distringas an Inquest is taken; yet if the Plaintiff relinquishes his Suit against him that is dead, and hath Judgment only against the other two; this is not erroneous, for the Writ was not abated against all by the Death of one, and the Process as to him that is dead is void. (c) 4 H. 7. 7. per Curiam, this is not Cause to arrest the Judgment. Mich. 14 Car. in Camera Scaccarii between Hiplyn and Slack, per Curiam adjudged no Error, and the Judgment given in B. R. in an Ejectione firmæ affirmed accordingly, where the Process was continued after Issue against him that was dead, and a Verdict

(c) Fitz. Br. 185. S. C.

given against him also; yet in as much (*) as no Judgment was given against him, (a) but a Surmise made that he died after the last Continuance, there being a Continuance from the Day of the Verdict (this being in Banco) till another Day in the same Term, and then Judgment given, and so no Judgment given against him, but only against the others; this was not Error.

(*) Fol. 799.

(a) Vide 1 Roll. Abr. 756. S. 4. 767. Q. 1. And the Notes there.

12. If (b) the *Venire* upon a proper Suggestion is awarded to the Coroner, and the *Tales de Circumstantibus* after returned by the Sheriff, this is Error not helpt after Verdict, by the Statutes of 38 *H.* 8. and (c) 18 *El. Trin.* 36 *El.* between (d) *Morgan* and *Wye*. *Moor* 316. *pl.* 482. adjudged.

(b) Carne and Pastow, S.P. Yelv. 15. Cro. El. 894.

(c) Vide my 1 Part 352.

and the Notes upon the Statute there, and vide Stat. 21 Jac. cap. 13. adjudged. Yelv. 15. S.C. cited.

(d) Cro. El. 574. S. C.

13. If the Sheriff according to the Statute of *York*, *viz.* 12 *Edw.* 2. *cap.* 5. does not set his Name to the Return of an *Habeas Corpus*, or *Decem Tales*, (e) this is Error. *Hill.* 38 *Eliz.* between (f) *Blodwel* and *Edwards*; *per Curiam*, *Cro. Eliz.* 509. resolved upon a Writ of Error.

(e) But where such Error after Verdict is helped. Vide 21 Jac. Cap. 13.

(f) Moor 430. pl. 602. S. C. adjudged.

(K) What Things ſhall be Error in the awarding of (a) Proceſs.

(a) Of the Venire, Stile 40, 183, 195. 2 Sand. 393. Moor 463. pl. 657. Cro. El. 467. Owen 59. Noy 57. (b) Stile 145. S. P. adjudged, and vide Stile 199, 248, 383.

1. (b) IN an Action in an inferior Court after Iſſue joined, a Continuance is made ad proximam Curiam tenendam ſuch a Day, &c. at which Day venerunt partes prædictæ, &c. ſuper quo a Venire facias is awarded for a Jury, &c. and it is not ſaid it was awarded by the Court, or ad eandem Curiam; and tho' a Jury is returned thereupon, and a Verdict and Judgment upon this, yet this is erroneous; for it may be that this was awarded out of Court, and then it is a void Trial. Trin. 1649. between Vigerous and Drake, adjudged in a Writ of Error upon a Judgment in Exeter; Intratur 16 Car. B. R. Rotulo 690. and ſo after adjudged ſeveral Times.

2. But if the Record be after Iſſue joined ſuper quo ad iſtam eandem Curiam, a Venire facias, &c. is awarded, it is good. Trin. 1649. between Peard and Harris in a Writ of Error upon a Judgment in Barneſtaple adjudged. Intratur Mich. 24 Car. B.R. Rot. 511.

3. If an *Elegit* be entered upon the Roll in this Manner, *viz. Elegit ſibi liberari medietatem omnium terrarum & tenementor' in comitat. S. tenend. &c. quouſque, &c.* omitting *quæ fuer' præd'* the Defendant; this is Error, though the Writ of *Elegit*, and the Return therof is well in this Point; for the Roll being faulty, it cannot be helped by the Writ. *Mich. 5 Jac.* between *Keene* and *Owen*. *Hob.* 90. adjudged upon a Writ of Error, and the Judgment *in adjudicatione Executionis* upon the *Elegit* reverſed.

(L) In Proceſs againſt Jurors and the Entry of ſuch Proceſs.

1. IN an inferior Court if the Parties are at Iſſue, and thereupon Proceſs is awarded to the Serjeant of the Mace (not naming his Name) & miniſter Curiæ præd' quod ſecundum conſuetudinem Venire faciat a Jury, &c. and at the Day of the Return, ad quem diem præfatus Serviens ad clavam & miniſter Curiæ prædictæ (without naming his Name) miſit præceptum ſuum præd' ei in forma præd' directum in omnibus executum & returnatum, &c. this is a good Return of the Jury; and Award of Proceſs, for the Naming of him is not neceſſary, for it appears the Officer did it. Trin. 14 Car. between Bellamy and Davis adjudged in a Writ of Error upon a Judgment in Exeter, this being aſſigned for Error. Intratur Hill. 12 Car.

2. In an Aſſiſe upon an Iſſue of null tort, &c. if it be entered quod quidam Juratores venerunt & quidam non venerunt, upon the Habeas corpora returned, ideo conſideratum fuit quod Vicecomes diſtringat Juratores

& apponat decem Tales, **though it is not entered** quot Juratores non venerunt, nec quot Juratores venerunt nec quod Aſſiſa remanet capienda, **becauſe a full Jury did not appear, yet it is not erroneous.** Mich. 38, 39 Eliz. B. R. **between** (a) Blodwell **and** Edwards per Curiam.

(a) Cro. El. 509. S. C. and S. P. per Cur' reſolved to be a manifeſt Error, though the Judgment was not then reverſed, becauſe of a Defect in the Writ.

3. **If in an Aſſiſe it be entered** quod quidam Juratores habuerunt viſum, & quidam non, ideo Aſſiſa remanet capienda, **this is not good, but erroneous, without ſhewing** quot habuerunt viſum & quot **not, for that it may be ſix had the View, which had been ſufficient.** (b) 15 H. 7. 16. b. (c) 1 R. 3. Mich. 38, 39 Eliz. B. R. **in Blodwell's Caſe agreed.**

(b) Br. Err. 85. S. C. Br. Aſſiſe 85. S. C.
(c) This ſhould be 1 R. 3. 4. which vide Fitz. Err. 48.

4. **In an Action in an inferior Court, if the Parties are at Iſſue, and thereupon it is entered upon the Record** Ideo venit inde Jurata, &c. **and a Jury is thereupon returned, and it is not expreſſed out of what Place the Jury ſhall come, this is** (*) **erroneous.** Mich. 9 Car. B. R. **between** Brodnox **and** Coppinger **adjudged in a Writ of Error upon a Judgment in the new Court of Marſhalſea, and the Judgment reverſed accordingly; for this is a new Court by Letters Patent, and hath a limited Juriſdiction; and therefore, tho' this is the Courſe of this Court and** in Banco, **yet it is not good in ſuch inferior new Courts, where the Court hath Juriſdiction** (c) **for** 12 **Miles** from Whitehall.

* Fol. 800.

(c) In the Original it is per.

5. **If an Inqueſt of Office be awarded in this Manner,** ſcilicet Venire facias 12, &c. **in an inferior Court, as in Norwich, when a Verdict is for the Plaintiff, if a** Venire facias 12, &c. **be awarded by the Cuſtom to inquire** de vero debito, **this is good.** Hill. 11 Car. B. R. **between** Watſon **and** Smith **adjudged in a Writ of Error.** Trin. 11 Car. B. R. **between** Slater **and** Bevis **adjudged in a Writ of Error out of Exeter.**

6. (d) **In an Action in an inferior Court, if the Parties are at Iſſue, and thereupon it is entered upon the Record** Ideo præceptum fuit J. S. Servientiad clavam quod Venire faciat hic ad proximam Curiam **ſuch a Day,** tenendam, &c. duodecim, &c. per quos, &c. & qui nec, &c. ad recognoſcendum, &c. quia tam, &c. **and that at the Day the Serjeant returned his Precept ſo to him directed,** una cum quodam panello de nominibus Juratorum in omnibus ſervitum & executum prout ei præceptum fuit, **and thereupon the Jury appears and tries the Iſſue for the Plaintiff; this is not good, becauſe it does not appear of what Place the** Venue **came; for tho' it be the Courſe of the Common Pleas and King's Bench, that have a general Juriſdiction to enter it with,** &c. **yet inferior Courts that are limited ought not ſo to do; for no Writ of Diminution or** Certiorari **lies to ſuch inferior Courts to certify the** Venire facias, **and therefore if it be not ſhewed in the Record from what Place it was awarded, it may be miſawarded; and yet there ſhall not be any Means to reverſe it becauſe it is erroneous.** Mich. 9 Car. B. R. **between** Cawdwell **and** Nun, per Curiam, **in a Writ of Error upon a Judgment in** Norwich. Intratur Tr. 9 Car. Paſ. 10 Car. B. R. **between** Watſon **and** Cawſon **adjudged upon a Writ of Error upon a Judgment in** Norwich, **in two Actions.** Intratur Trin. 9 Car. Rot. 862. **and the Judgment reverſed accordingly.** Paſch. 11 Car. B. R. **between** Richards **and** Hance **adjudged.** Intratur Trin. 10 Car. Rot. 720.

(d) Stile 20. S. P. adjudged, but for this vide Stile 86, 164, 165, 187, 195. 1 Sid. 364. Raym 20.

7. (e) **If upon an Iſſue in a Borough Court** a Venire facias **is awarded** de (f) Burgo, **and does not ſay** infra Juriſdictionem Curiæ, **yet it is good, for it ſhall be intended all one.** Mich. 9 Car. B. R. **between** Noble **and** Tonny **adjudged upon a Writ of Error upon a Judgment** in Reading. Intratur Trin. 9 Car. Rot. 1377.

(e) Lat. 214. L. P. otherwiſe in the Court of the Verge which removes with the King.

(f) So where de vicineto de Burgo, becauſe by Virtue of that Writ a Jury within the Borough may be returned, 2 Roll. Rep. 44.

8. Upon

8. Upon a Venire facias to try an Iſſue, if the Sheriff returns but twenty-one, ſixteen of which appear at the Niſi prius, and a Tales is there awarded de Circumſtantibus, and the Iſſue tried, this is erroneous, for that he hath not returned twenty-four, for though the Venire facias is per duodecim legales, &c. yet the Order hath always been to return twenty-four, and in as much as the Venire facias is bad, the Tales is alſo Mich. 7 Jac. B. between Evans and Filpot, Paſch. 7 Car. B. R. between (a) Sainthil and Stocker adjudged in a Writ of Error, and Judgment reverſed accordingly. 8 Car. between Taylor and Nunly adjudged in B. R. Paſ. 11 Car. B. R. between Hurſon and Hame adjudged, this being moved in Arreſt of Judgment.

(a) Cro. Car. 223. S. C. 1 Jon. 245. S. C. by which Books it was agreed by the greater Part of the Judges, that it was helped after Verdict by the Stat. of 18 Eliz. for which vide my 1ſt Part 454.

9. If upon the Venire facias twenty-four Jurors are returned, and upon the Habeas Corpora the (b) Chriſtian Name of one of the twenty-four is miſtaken, ſo that he is by Intendment another Man; but he does not appear, and a Tales is granted and a Verdict, this is helped by the Statute. Paſch. 11 Car. B. R. between Creed and Lucking adjudged per Curiam. Intratur Trin. 10 Car. Rot. 1178.

(b) Vide my 1ſt Part 455.

10. So if an Iſſue be joined between a Denizen and Alien, and a Venire (*) facias is awarded, and the Sheriff returns twelve Denizens, and twelve Aliens; and but four Aliens appear, and they four with eight Denizens are ſworn of the Inqueſt, who try the Iſſue, this is erroneous, for there ought to be ſix Denizens and ſix Aliens, which ought to try the Iſſue; otherwiſe the Trial ought to remain for want of Jurors. Paſch. 9 Car. B.R. between (c) Aileway and Shillinge. This moved in arreſt of Judgment, and after a new Venire facias granted for this Cauſe per Curiam.

Fol. 801.

(c) 2 Roll. Abr. 643. p. 2. S. C.

11. If an Iſſue be joined in Durham upon a Suit there, and upon this Proceſs is awarded Ideo præceptum eſt, &c. duodecim, &c. per quos, &c. qui nec, &c. this is good, without ſhewing of what Place the Venue comes, for this is a County Palatine, and they have a general Juriſdiction within the County, as the Court of King's Bench hath here; and therefore it is good as in Banco. Mich. 10 Car. B. R. between Rowlandſon and Simpſon adjudged in a Writ of Error upon a Judgment before the Juſtices itinerant in Durham, and the Judgment affirmed accordingly. Intratur Hill. 9 Car. Rot. 201. Mich. 10 Car. B. R. between Miller and Manwaring per Curiam, accordingly in a Writ of Error upon a Judgment in Cheſter. Intratur Trin. 10 Car. Rot. 321. Paſch. 13 Car. B. R. adjudged in a Writ of Error between Rippon and Rampton.

12. If an Iſſue be joined in an inferior Court, ſcilicet, a Court of a Borough, and thereupon it is entered Ideo præceptum quod Venire faciat 12, &c. per quos, &c. qui nec, &c. and that the Bailiff returned præceptum debito modo ſervitum & executum cum panello 12 Juratorum de vicineto Burgi & Villæ prædictorum eid' annexo; whether it be good. Mich. 10 Car. B. R. between Oakes and Chaplyn dubitatur, in a Writ of Error upon a Judgment in Ipſwich. Intratur Trin. 10 Car. Rot. 775. But Paſch. 11. for the Judgment was reverſed for this Cauſe.

(M) In

(M) In (a) Verdicts.

(a) For ſame Title vide Antea, 50. and vide alſo Verdict under Title Trial.

1. If a Judgment be given by Nihil dicit in an inferior Court, and the Record is returned, that the Writ of Inquiry of Damages was per Sacramentum (b) proborum & legalium, and not hominum; this is erroneous. Hill. 11 Car. B. R. adjudged in a Writ of Error, and reverſed accordingly. Intratur Trin. 11 Car. Rot. 1153.

(b) Probos & legal' homines omitted, Stile 86. Vid. Ray. 417.

2. If in a Writ of Error it be certified that the Jury who tried the Iſſue dixerunt pro querente, &c. this is erroneous, for that it ought to be certified in the (c) preſent Tenſe, as it was at the Time of the Verdict given; for when it is dixerunt, it is not known when they gave their Verdict, and it may be a long Time before the Iſſue. It was ſo adjudged in B. R. in a Writ of Error upon a Judgment given in Barnſtaple.

(c) So where the Venire was Præceptum fuit, 2 Sand. 393. 1 Mod. 81.

3. So in a Writ of Error if the Record be certified, that the Jury aſſiderunt damna to ſo much, &c. this is not good. Trin. 8 Car. B. R. between Booth and Rowe adjudged in a Writ of Error, and the Judgment given in an inferior Court reverſed for this Cauſe.

4. If in Treſpaſs the Place where, &c. be aſſigned to be Parcel cujuſdam peciæ terræ & cujuſdam foſſati, Anglice Ditch, pertinentis cuidam meſſuagio vocat' Falſtoff, the Place, &c. and the Defendant pleads as to all the Treſpaſs in loco in quo, &c. præter in prædicta pecia foſſati prædicti fieri ſuppoſit' Not guilty, & de hoc ponit ſe ſuper patriam, & querens ſimiliter, & quoad aliquam tranſgreſſionem in prædicta pecia foſſati pleads a ſpecial Juſtification, upon which the Plaintiff takes Iſſue alſo, and the Jury find the Iſſue joined upon the Juſtification for the Plaintiff, and do not inquire of the other Iſſue, and after Judgment is given for the Plaintiff, this is erroneous; for theſe were two Iſſues for Parcel of the Place where, (*) &c. might be Parcel of the Piece of Land, and other Parcel of the Ditch, and not Parcel of the Piece of Land; and the Jury ought to inquire of all the Iſſues joined, otherwiſe they do not well perform the Command of the Writ of Venire facias. Trin. 9 Car. B. R. between Morgan and Stint adjudged in Camera Scaccarii in a Writ of Error, and the firſt Judgment reverſed accordingly; and there the Caſe was alſo, that there were three Iſſues, ſcilicet, the firſt, Not guilty for taking of Bricks, &c. the ſecond, Not guilty as before is alledged, and the third, upon the Juſtification. And the Jury ſay, as to the firſt Iſſue inter partes prædictas in forma prædicta junctum, for the Plaintiff, & quoad ſecundum exitum ſuperius in forma prædicta junctum, for the Plaintiff alſo, where the Iſſue upon the Juſtification was the third Iſſue; and for this alſo held per Curiam, not good.

(*) Fol. 802.

5. In an Action upon the Caſe againſt an Adminiſtrator, upon his own Promiſe to pay 50 l. due by the Inteſtate, and Non aſſumpſit pleaded; if the Jury find that he promiſed to pay 30 l. Part thereof, and find nothing concerning the reſt, and Judgment is thereupon given, this is erroneous. Trin. 14 Car. B. R. (d) between Kitchinman and the Biſhop of Oſſory in Hibernia. In a Writ of Error upon a Judgment in Ireland, and this reverſed for this Cauſe among others. Intratur Hill. 13 Car. Rot. 1141.

(d) 2 Roll. Abr. 719. pl. 27. S. C.

6. In Debt againſt an Adminiſtrator upon a Promiſe by the Inteſtate for 300 l. if the Defendant pleads four Judgments againſt him upon Obligations, one of 200 l. to A. the ſecond of 216 l. to B. the third of 600 l. to C. the fourth of 100 l. to D. and that he hath not Aſſets ultra 5 l. which is liable to the ſaid Judgments, and

that he hath fully administred, præter the said 5 l. to which the Plaintiff replies as to the first Judgment, that the Defendant had paid to A. 100 l. of his Judgment, and that A. would accept 20 l. more in Satisfaction of his Judgment, but that it is kept in force by Fraud to deceive him of his Debt; and so he pleads also as to the second and third Judgments, and as to the fourth Judgment, he acknowledges it is in force, not satisfied; but he farther says, that all the Money to the said A. B. and C. paid, and by the Agreements aforesaid to be paid with the 100 l. recovered by the said D. amounted to 691 l. 5 s. and that the Defendant hath Assets ultra this, & hoc petit quod inquiratur per patriam, & defendens similiter; and the Defendant rejoins, and traverses the Fraud alledged by the Plaintiff, upon which there are three several Issues joined, and the Jury find the three Issues joined upon the Fraud for the Plaintiff, and assess Damages to 310 l. and 40 s. Costs, and do not inquire of the other Issue, scilicet, whether the Defendant hath Assets ultra, the 691 l. 5 s. which is acknowledged by the Plaintiff, ought to be paid without Fraud upon the Judgments; but Judgment is given upon this Verdict for the Plaintiff, to recover the Damages and Costs, de bonis testatoris si, &c. & si non, for the Costs de bonis propriis; this Judgment is erroneous, in as much as the Jury did not inquire of the said Issue, nor find any Assets in the Hands of the Defendant. Trin. 9 Car. B. R. Intratur Hill. 7 Car. Rot. 571. between Croyden and Atwaie adjudged; and the Judgment given in Banco reversed for this Cause.

7. In a Quare impedit against the Patron and Incumbent, if an Issue be joined upon the Plea of the Patron, and another Issue upon the Plea of the Incumbent, and the Jury find the Issue against the Patron for the Plaintiff, and (a) find nothing of the other Issue, and notwithstanding Judgment is given for the Plaintiff, this is erroneous. Pas. 11 Car. B. R. between Burnet and Bleverhasset adjudged in a Writ of Error, and the Judgment given in Banco reversed accordingly. Intratur 9 Car. Rot. 977.

(a) Where no Verdict is given as to one Defendant, or as to one Issue, it is imperfect. 2 Leon. 22. 3 Leon. 83. Cro. Eliz. 854, 866. Yelv. 106, 109. 2 Brownl. 209. but for this vide Title Verdict under Title Trial.

8. In a Writ of Dower, if upon ne unque seisie que Dower pleaded, the Jury find for the Plaintiff, and give Damages to the Plaintiff, and do not find that the Husband died seised, and the Court gave Judgment accordingly for the (*) Damage, this is erroneous. Hill. 11 Car. B. R. between Hodgson and Cremer adjudged in two Writs of Error upon two Judgments in Lynn, and the Judgments there given reversed accordingly. Intratur Hill. 11 Car.

(*) Fol. 803.

9. But Nota, that such Judgment for the Damages only was reversed, because it is given by the Force of the (b) Statute; but the Judgment to recover her Dower of the Land, being at Common Law, stood not reversed per Curiam, they being several and distinct Judgments between Tye and Atkins. Trin. 13 Car. B. R. between (c) Tye and Atkins. Intratur Hill. 12 Car. Rot. 759. but Note, the Judgment there was not given upon a Verdict, but Judgment given for the Land by Default, and a Writ awarded for the Damages, but not averred that the Baron died seised, or found by the Jury: But Justice Jones after said to me, that this was not to be taken for a Precedent, because it was given upon the Letter of the King.

(b) For this Statute, and the Notes thereupon vide my 2d Part 679.

(c) 1 Roll. Abr. 776. pl. 7. S. C. Stil. 290. S. P.

10. In an Account against one as Bailiff of Clothes, the Defendant, as to Part, says he was Bailiff to the Plaintiff, and a Stranger jointly, and as to the Rest, never his Bailiff, and the Jury find he was his Bailiff for sixteen Clothes, and for the rest not his Bailiff, without mentioning whether the Sixteen were of those which the Plaintiff and Stranger had jointly, and Judgment given for the Plaintiff; yet this is no Error, for the Verdict is well

well enough for the Iſſue. *Mich.* 37 & 38 *Eliz.* between *Tirrel* and *Darcy*. *Moor* 548. *pl.* 733. adjudged upon a Writ of Error.

11. If in Treſpaſs for breaking the Plaintiff's Cloſe, and eating his Graſs *averiis, viz. equis, bobus, &c.* the Defendant, *quoad* any Treſpaſs *aliquibus averiis, præterquam duobus Spadonibus & tribus vaccis*, pleads Not guilty, and as to the three Geldings, and three Cows, preſcribes for Common, upon which they are at Iſſue; and as to the firſt Iſſue, the Deſendant is found Guilty *cum aliquibus averiis præterquam, &c.* and the other Iſſue is alſo found for the Plaintiff, and Judgment thereupon; (*) tho' it is not found by the Verdict with what Number or Kind of Cattle he is Guilty; yet it is no Error, but the Verdict good enough, aſſeſſing Damages ſeverally between *Harfleet* and *Butcher*, *Cro. Jac.* 614. adjudged upon a Writ of Error.

(*) Stile 170.

(N) In Proceſs againſt Jurors, and the Entry of ſuch Proceſs.

(a) Where a full Jury appears, it is not uſual to enter their Names on the Record, otherwiſe where the Inqueſt is by Part of the principal Panel, and others returned on the Tales de Circumſtantibus, Cro. Eliz. 281.

1. Upon an Iſſue joined in an inferior Court, if a Venire facias be awarded to the Officer to return twenty-four Jurors, this is not good. Mich. 14 Car. B. R. between De Hunt and Steere per Curiam.

2. But if the Venire facias be to return twelve, and in the ſame Precept it is commanded Habere corpora 24. to try the Iſſue, and thereupon twenty-four are returned, and the Iſſue tried by twelve of them, this is good; for the Command Habere Corpora 24. is but a Direction according to Law, for he ought to have returned twenty-four upon the Venire facias. Mich. 14 Car. B. R. between Ernely and Sage per Curiam, adjudged in a Writ of Error upon a Judgment in Bediford, and the Judgment affirmed accordingly. Intratur Mich. 13 Car. Rot. 531.

3. (b) In a Writ of Error upon a Judgment in an inferior Court, if the Record be certified that an Iſſue was joined, and that 12, &c. de vicineto de Burgo, &c. and all duly done; but the Name of the Jurors are not returned, though the Uſe be to name them, yet it is well enough. Mich. 14 Car. B. R. between Tingholme and Skinner per Curiam, adjudged in a Writ of Error upon ſuch Judgment in the Town of Boſton in the County of Lincoln, and the Judgment affirmed accordingly. Intratur Trin. 14 Car. Rot. 520.

(b) Stile 154. S. P. per Roll, Chief Juſtice, who ſaid it was not neceſſary to return their Names, though it was the old Way to do ſo.

4. (c) If a Venire facias awarded in an inferior Court, be to the Officer of the Court quod Venire faciat 12, &c. per quos rei veritas melius Scire, not Sciri, poterit, this is erroneous, though it was ſaid the Precedents were both ways. M. 21 Car. B. R. between (d) Ludlow and Edgworth adjudged, and a Judgment in Canterbury reverſed accordingly. Vide the Statute of 35 H. 8. cap. by which is ordained the

(c) 2 Lev. 83. S. P. adjudged, and vide 1 Sid. 406.

(d) Raym. 417. S. C. cited.

the Form of Writs of Venire facias in the Courts at Weſtminſter, and there the Writ is Sciri.

5. If a Venire facias in an inferior Court held by Charter, be quorum quilibet habeat 4 l. terrarum, tenementorum vel reddituum, this is erroneous, for the Statute of 27 Eliz. cap. 6. extends only to the Courts at Weſtminſter, and not to inferior Courts, and therefore the Law in inferior Courts is as it was before the Statute, ſcilicet, 40s. and it may be that there are not ſufficient Jurors within the Juriſdiction, that have 4 l. terræ, and then there will be a Failure of Juſtice, and (a) they have not Power in ſuch inferior Courts to alter the Form of ſuch Writs. Mich. 21 Car. B. R. between Bond and Cartwright adjudged, and a Judgment in the Marſhalſea reverſed for this Cauſe.

(a) But the Courts above according to the Exigence of the Caſe, may inſert a Caution in the Venire, that the Sheriff returns a Jury that have a Freehold of the Value of five Pounds or more, &c. Palm. 386. —But for this vid. Cro. Eliz. 257. Cro. Jac. 672. 2 Roll. Rep. 395. All. 14. Ray. 417.

* Fol. 804.

6. At a Court held in the City of York, before A. and B. Sheriffs of the (*) City of York, if the Plaintiff declares of a Treſpaſs for taking certain Goods apud civitatem Ebor' ac infra Juriſdictionem Curiæ, and upon Not guilty pleaded, a Venire facias is awarded to the Serjeants of the Mace in the City, and Miniſters of the Court to return 12 probos, &c. de Balliva dictorum vicecomitum, and they return a Jury accordingly; this is not a good Award of the Venire, for it may be the Bailiwick of the Sheriffs extends beyond the City as is uſual in ſeveral Cities, and alſo this is not the Form of Returns in the Courts at Weſtminſter, and for that ſuch inferior Courts ſhall not be permitted to award a Venire facias in other Manner than our Courts here, though it be in equivalent Terms, but more ſpecially not in Terms that are ambiguous and doubtful as to the Extent of them, and the Uſe to award a Venire is, (b) de vicineto civitatis, or de civitate, and not de Balliva. Mich. 22 Car. B. R. in a Writ of Error upon a Judgment given at York adjudged, and the firſt Judgment reverſed for this Error. Intratur Paſch. 22 Car. Rot. 251.

(b) From what Place a Venire may come, vide under Title Venue in Title Trial.

7. In an Action brought in an inferior Court in the Town of S. and the Stile of the Court is Curia de S. &c. and the Treſpaſs is ſuppoſed to be done apud S. in Warda de D. infra Juriſdictionem Curiæ, and upon Not guilty pleaded, the Venire facias is awarded de Warda de D. prædicta, without ſaying infra Juriſdictionem Curiæ, as was before; for all the Ward is laid to be within the Vill, and this is the Court of the Vill which comprehends the Ward, and the Allegation before, that it was within the Juriſdiction of the Court, is not made to limit the Ward, or to imply that any Part of the Ward is out of the Juriſdiction, but is a cumulative Averment, for the more Certainty, being mentioned before to be within the Vill. Trin. 1649. between Shephard and Parry adjudged in a Writ of Error upon a Judgment in Ludlow. Intratur Hill. 24 Car. Rot. 217.

8. In an Indictment for ſcandalous Words againſt the Queen-Mother of France, &c. upon Not guilty pleaded, a Venire facias was awarded to the Sheriff at the Aſſiſes in Devon to return a Jury, upon which the Record is ſuper hoc, ſuch Jurors by Name, twelve Jurors per J. P. Vicecomitem comitatus prædicti impannellati electi triati & jurati dicunt per Sacramentum ſuum quod Defendens eſt culpabilis, &c. upon which Judgment is given againſt the Defendant, this is erroneous, becauſe as this is entered, the Sheriff elected, tried and ſwore the Jurors, which he could not do. Tr. 23 Car. B. R. (c) Plaiſes's Caſe adjudged in a Writ of Error, and the Judgment given againſt him at the Aſſiſes at Exeter, reverſed for this Error.

(c) Stile 25, 28. by which the Court elected, tried &c. Vide.

9. In an Action of Aſſault and Battery againſt two, if Judgment be given againſt one by Nihil dicit, and the other pleads to Iſſue, and thereupon there is an Award of a Venire facias ad triandum exitum,

&c. and the Award is not tam ad triandum exitum quam ad inquirendum de damnis, &c. as the Use is, and the Jury find the Issue for the Plaintiff and assess Damages; this is not erroneous; for though it is good Policy to make the Award tam ad triandum exitum quam ad inquirendum of the Damages, because if the Issue be found against the Plaintiff, the Jury cannot inquire of the Damages against the other without such Award made; yet if the Issue be found for the Plaintiff, (*) then the Damages that the Jury give, bind the other Defendant, and this as to him is not an Inquest of Office, but a Verdict upon which he may have an Attaint, and therefore the Omitting of this Award, in this Case, the Issue being found for the Plaintiff, is not now material, and so not erroneous. Mich. 1649. between Brooks and Brooks adjudged, this being shewed for Error in a Writ of Error upon a Judgment in Banco. Intratur Mich. 24 Car. Rot. 287.

(*) For this vide my 2 d Part 445.

(O) (a) What Judgment shall be given in this Writ.

Fol. 805.

(a) For same Title vide Antea 60.

1. THE Court where the Writ of Error is, ought to give the same Judgment as the Justices of the inferior Court ought, if they had not erred, as if the first Writ be abated by Judgment; if it be reversed in this Writ of Error, the Judgment shall be, that the Defendant shall answer to it there where the Writ of Error is, for so the inferior Court ought to have done: So if Judgment be upon a bad Writ, and Error brought and the Writ abated, all shall be reversed. So where the Demandant is barred by Judgment, if in Error it be adjudged no Bar, Judgment shall be that the Demandant shall recover Seisin of the Land, for so the inferior Court ought to have done. (b) 38 H. 6. 31. (c) 1 H. 7. 12. (d) 9 H. 6. 38. b. (e) 21 E. 4. 82. contra 9 H. 6. 38. b.

(b) Fitz. Err. 38. S. C. Br. Err. 105. S. C.

(c) Br. Err. 133. S. C. (d) Br. Err. 7. S. C. (e) Br. Jurisdiction 78. S. C.

2. If Judgment be given upon a bad Declaration in Banco, and for this reversed in Banco Regis, the Defendant shall answer to the Declaration, though it be a Formedon. (f) 21 E. 4. 82. 11 H. 4. 49.

(f) Br. Jurisdiction 78. S. C.

3. In an Assise, if a good Plea in Bar be pleaded, and notwithstanding the Assise is awarded at large, where the Plaintiff ought to be put to answer to the Bar, and the Assise found for the Demandant; and adjudged, if it be reversed in Banco Regis for the Cause aforesaid, the Tenant shall be put in the same State as he was before, and the Demandant shall be put to * pursue—— there if he will, or have a new Assise at his Pleasure. (g) 50 E. 3. 19.

* In the Original it is a pursuer a- vant la.

(g) Br. Err. 30. S. C.

4. So if the Tenant in the first Action recovers in a Writ of Error, he shall be restored by Judgment to the Land. (a) 18 E. 4. 11. and to the (b) mesne Profits. (c) 18 E. 4. 11. (d) 4 H. 7. 11. (e) 9 H. 4. 6.

(a) Br. Disceit 30. S. C.

(b) Only from the Time of the Execution, and therefore if it appears that was not had till some considerable Time after the Judgment, there shall be a special Writ. Vide Palm. 324. Vide Latch. 259. Cro. Jac. 698. 2 Roll. Rep. 475. 13 Co. 19, 20. (c) Br. Disceit 30. S. C. (d) Br. Relation 44. S. C. Br. Trespas 425 S. C. (e) Br. Rediſſeiſin 1. S. C.

5. If an Outlawry be reversed in a Writ of Error upon an Indictment of Felony he shall be restored to the Common Law, and all that he hath lost for this Cause. (f) 11 H. 4. 53. b.

(f) Br. Restitution 28. S. C. Goulſ. 103, 104.

6. If a Man reverses a Judgment in a Writ of Annuity, he shall be restored to all that he paid after the Judgment also. 11 H. 4. 48.

7. So he shall (g) be restored to all that he hath paid, by force of a Scire facias upon the Judgment. 11 H. 4. 48.

(g) Buttowhat a Man shall be restored after Reversal of a Judgment. Vide Antea 66. pl. 1, 2. &c.

8. In an Action upon the Case for Words, if a Verdict be found for the Plaintiff in an inferior Court, and after Judgment is given against the Plaintiff upon the Declaration quod nil capiat per Billam, and after the Plaintiff brings a Writ of Error, where the Judgment is reversed for an Error in the Entry of the Judgment, scilicet, for that it was Ideo conceſſum eſt, for the Word consideratum eſt quod querens nil capiat per Billam, the Court ought to give Judgment either against the Plaintiff, or against the Defendant, if upon the Declaration and Proceeding, the inferior Court ought to have given Judgment against him, scilicet, if the Declaration be not good, the Court ought to give Judgment against the Plaintiff. Hill. 11 Car. B. R. between (h) Delamore and Heskins adjudged in a Writ of Error upon a Judgment in Bath, and Judgment given against the Plaintiff accordingly, because the Declaration was not good. Intratur Trin. 11 Car. Rot. 900.

(h) Antea 60. pl. 1. S. C. which vide and the Notes there.

9. If the Error be Error in Fact, and not in the Record, as for Infancy, the Judgment shall be quod pro Errore prædicto Judicium prædictum revocetur, without saying & aliis in Recordo. D. 1. 2 M. 104. 10.

10. If a Judgment be affirmed in Banco Regis upon a Writ of Error, the Judgment shall be quod Judicium redditum remanebit ſtabile in perpetuum. 21 E 4. 44.

Bill of Exceptions.

1. THO' by the Common Law, a Writ of Error lay for an Error in Law apparent in the Record, or for an Error in Fact, where either Party died before Judgment, yet it lay not for an Error in Law not appearing in the Record; and therefore where the Plaintiff or Demandant, Tenant or Defendant, alledged any Thing *ore tenus*, which was over-ruled by the Judge; this could not be aſſigned for Error, not appearing within the Record, nor being any Error in Fact, but in Law, and ſo the Party grieved was without Remedy. 2 *Inſt.* 426.

2. (a) But by the Statute of *Weſtm.* 2. *viz.* 13 *Ed.* 1. *cap.* 30. when one (b) impleaded before (c) any of the (d) Juſtices alledges an (e) Exception, praying they will allow it, and if they (f) will not, if he that alledges the Exception writes the ſame, and (g) requires the Juſtices will put to their Seals; the Juſtices (h) ſhall ſo do, and if (i) one will not, another ſhall; and if upon Complaint made of the Juſtices, the King (k) cauſe the Record to come before him, and the Exception be not found in the Roll, and the (l) Plaintiff ſhew the written Exception with the Seal of the Juſtices thereto put, (m) the (n) Juſtice ſhall be commanded to appear at a certain Day, either to confeſs or deny his Seal, and if he (o) cannot deny his Seal (p) they ſhall proceed to Judgment according to the Exception, as it ought to be allowed or diſallowed.

(a) 9 Co. 13. b.

(b) Extends to Plaintiff as well as Defendant in all Actions, whether Real, &c. 2 Inſt. 427. — but not to one not Party to the Record, as Bailiff of a Franchiſe who demands Conuſance, &c. 2 Inſt. 427. —Otherwiſe of him that comes loco tenentis, as one that prays to be received, or the Vouchee. 2 Inſt. 427. —But this extends not to criminal Proſecutions by Indictment, but only to Actions between Party and Party, Sir Henry Vane, 1 Sid. 84. adjudged, 1 Keb. 324. 1 Lev. 68. adjudged. Raym. 486. cited. Goulds. 137. (c) Extends to B. R. though Pleas are there held coram Rege, 2 Jon. 117. 2 Lev. 237. (d) Extends to inferior Courts, though not of Record, as Hundred-Court, 2 Inſt. 427. (e) This extends not only to all Pleas, dilatory and peremptory, but to Prayers to be received, Oyer of Records and Deeds, &c. and any material Evidence offered and over-ruled, 2 Inſt. 427. Dy. 231. pl. 3. Raym. 486. (f) If Evidence allowed, but not believed by the Jury, no Bill of Exception lies, Caſ. Par. 116. (g) Though no Time is mentioned, yet it muſt be before Judgment; though if they before deny to put to their Seals, they may after Judgment be commanded, and their doing it then will be ſufficient, 2 Inſt. 427. (h) The Command of the Writ is conditional quod ſi ita eſt tunc ſigilla veſtra apponatis, ſo that if a Falſity be inſerted in the Bill, the Judges are not bound to Seal, but may return the ſpecial Matter Caſ. in Par. 122. (i) It is ſufficient if one ſets his Seal, but if all refuſe, it is a Contempt in all, and a Writ lies to command them to put to their Seals, 2 Inſt. 427. Raym. 182. 2 Lev. 237. —Vide Caſes in Parl. 116. Where a Petition was exhibited to the Lords in Parliament, to oblige the Judges to ſign, 2 Lev. 238. (k) Yet a Bill of Exception lies upon a Trial at Bar, or by Niſi prius, tho' the Record is there before: So upon a Trial in the Exchequer, though that Record cannot be removed in B. R. but by Error will be brought before other Juſtices, 2 Lev. 237, 238. (l) Though the Party grieved be dead, his Heirs or Executors may have Error upon this Bill of Exceptions, 2 Inſt. 427. (m) Where the Record is in the ſame Court, there is no Occaſion for a Scire facias ad cogn', 2 Jon. 117. 2 Lev. 237. (n) And if the Judge dies, a Scire facias lies againſt his Executors to, &c. 2 Inſt. 428. (o) If he denies it, the Party may take Iſſue thereupon, and prove it by Witneſs, 2 Inſt. 427. (p) Whether Advantage of a Bill of Exceptions upon a Trial at Bar in B. R. may be taken in Arreſt of Judgment, vide Enfield and Hill. 2 Lev. 237. 2 Jon. 117.

3. If in a Trial upon a Title to a Leaſe for Years, the Judges (tho' inſiſted upon) will not direct the Jury that the Probat of a Will is concluſive Evidence, but will only tell the Jury it is good Evidence, and thereupon the Jury find there is no ſuch Will: Yet a Bill of Exceptions will not lye, for though the Evidence be concluſive, the Jury if they will may run the Hazard of an Attaint. *Paſch.* 32 *Car.* 2. between (q) *Chicheſter* and *Phi-lips Raym.* 404, 405. adjudged in *B. R.* here, upon a Writ of Error upon a Judgment

(q) 2 Jones 146. S.C. adjudged.

Judgment in *B.* in *Ireland*, which was affirmed in *B. R.* there, and it was ſaid, the proper Method had been to demur to the Evidence.

4. If one offers to demur upon Evidence, and is over-ruled, and after Judgment a Writ of Error is brought, this cannot be aſſigned for Error; But it is a proper Caſe for a Bill of Exceptions, and the Remedy which the Statute in that Caſe appoints. *Hill.* 9 *Car.* (a) *Cort* and the *Biſhop of St. Davids* and others. *Cro. Car.* 341. adjudged.

(a) Lort and the Biſhop of St. Davids, 1 Jon. 331. S. C. by which it appears a Bill of Exceptions was tendered and ſigned.

F I N I S.

I THE

(a) Eſcape.

By Sufferance.

(a) It is an Eſcape when with the Gaoler's Conſent, and a Breach of Gaol when without. Cro. Car. 210. — And when with his Conſent, is an Offence as well puniſhable in the Priſoner as Gaoler. Cro. Car. 210. and vide 2 Leon. 166.

(A) What ſhall be (b) ſaid an Eſcape.

Fol. 806.

1. **If a Man in Execution be ſuffered to go at large for a Time out of the County, and to return, this is an Eſcape.**

(b) Cannot be ſaid to be ſo when the Party was never in Priſon. Cro. Car. 210. 1 Sid. 220. 5 Mod. 414, 416. —— or when the Party was never lawfully arreſted. Eden and Lloyd. Cro. El. 877, 894. and vide 1 Leon. 263. —— and when he ſhall be ſaid to be arreſted, or not, vide Salk. 79. Far. 8. 6 Mod. 173, 211.

2. **So if he be ſuffered to go at large for a Time to any Place within the County, and to return, yet this is an Eſcape.**

3. (c) **If a Man in Execution be ſuffered to go at large for a Time out of the County, and to return, and this upon Bail or Mainprize; yet this is an Eſcape, for he ought to be kept in Arcta Cuſtodia.**

(c) Dyer 278. b. S. P.

4. (d) **So it is tho' he be ſuffered to go at large to any Place within the ſame County with † a Keeper, for the Cauſe aforeſaid.** Com. Plat's Caſe 36. b. Co. 3. Boyton 44. and Dyer 13 El. 297, 24.

(d) Cro. Eliz. 5. S. P. per Curiam. Hetl. 32.

† In the Original it is per Baſton.

5. **If the Sheriff ſuffers him to go at large with a Keeper in the ſame Town where the Priſon is in the ſame County, this is an Eſcape.** Hobart's Rep. (e) 273. **The Sheriff of Eſſex's Caſe.**

(e) Fol. 202. S. C.

6. If a Woman be Warden of the *Fleet*, and marries a Priſoner there, this is an Eſcape in the Woman, for the Husband cannot be in the Cuſtody of his Wife. (f) *Pl. Com.* 37. *per Cholmley* Ch. Baron.

(f) 2 Vent. 19. S. C. cited, —— and vid. Stil. 465. where it is ſaid by Glyn Ch. Juſtice, that to commit the Marſhal to the Priſon whereof he is Keeper, without ſecuring the Priſoners, would be an Eſcape in Law of all of them.

7. If the Sheriff dies, and before another is made, one in Execution goes at large, (g) this is no Eſcape, for the Priſoners were in the Cuſtody of the Law till a new Sheriff made. 3 *Co.* 72. *b.*

(g) There is no Remedy but to take him again. 1 Mod. 14. —— But by 3 Geo. 1. in Caſe of the Sheriff's Death, the Under-Sheriff ſhall continue in his Office, and be anſwerable for the Execution of the Office in all Things and to all Purpoſes, until a new High Sheriff ſhall be appointed; and the Security given by the Under-Sheriff, and his Pledges, ſhall ſtand to the King and all Perſons, &c.

8. But after a new Sheriff is made, he is bound to take Notice of all Executions againſt any Perſon he finds in the Gaol, for there is no Perſon to make Delivery, or give him Notice thereof. (h) 3 *Co.* 72. *b.*

(h) Cro. Eliz. 366. S. C. and S. P. per Curiam.

(a) (b) (c) (d) (e) (B) Who ſhall be charged in an Action for an Eſcape.

(a) Where the Sheriff may have an Action againſt the Priſoner that eſcapes. Godb. 125. Moor 660. Lutw. 64, 65. and vide Moor 597. pl. 816. My 1 Part 189. C. 1,2,3. — The Licence of the Gaoler no Bar of this Action. Moor 404. pl. 541.

1. (f) IF a Capias iſſues out of the Court of the Sheriff of London, (viz.) the Counter, directed to a Serjeant againſt A. and he takes him, and ſuffers him to eſcape before he hath brought him to the Counter; in this Caſe the Action for the Eſcape lies (g) againſt the Serjeant, and not againſt the Sheriff, for he was never in the Cuſtody of the Sheriff, in as much as he was never brought within the Counter; for after he is there, he is within the Cuſtody of the (h) Sheriff, but not before; for the Sheriff is the Judge of the Court, and not a Miniſter to execute the Proceſs of the Court; but he is the Gaoler of the Counter, and ought to anſwer for the Priſoners there. Mich. 15 Car. B. R. Between Dun and Patie, per Curiam; and Brampſton ſaid that he ruled it upon Evidence, that where it was alledged in the Declaration in an Action upon the Caſe, that A. was in the Cuſtody of the Sheriff, where he was not brought to the Counter; this was not good, in as much as he was not in his Cuſtody.

(b) My 1 Part 190, 191, vide.

(c) 2 Roll. Abr. 552. pl. 9, 10, vide.

(d) Where he that hath the Cuſtody of a Gaol by Wrong, or de facto, ſhall be anſwerable for an Eſcape. 2 Inſt. 382. Br. Eſcape 18. 2 Mod. 120. (e) Not againſt one that is only a Deputy, but againſt him that appointed him. 2 Lev. 159. (f) Husbands verſus Cole. 1 Sid. 318. 2 Keb. 147. (g) But if he ſhews he delivered him over to the Sheriff, that will excuſe the Serjeant, for the Sheriff may make his Houſe his Priſon if he will. 1 Sid. 318. (h) Not of him only in whoſe Court the Plaint was levied, but of both; and both may be charged for the Eſcape. Ryding and Edwin, Carth. 145. Show. 162, 163. —— but vide Skin. 105.

2. But if a Latitat be directed out of the King's Bench to the Sheriff of London, to take J. S. and he makes a Warrant to a Serjeant to arreſt him, and the Serjeant arreſts him accordingly, and after ſuffers him to eſcape before he brings him to the Counter; an Action lies againſt the Sheriff for this Eſcape, becauſe he was in the Cuſtody of the Sheriff preſently by the Arreſt; for there the Sheriff was the Officer of the Court of King's Bench, and not the Serjeant. Mich. 15 Car. B. R. Between Dunn and Patie, per Curiam.

3. If *J. S.* be in Execution at the Suit of *A.* and *B.* ſeverally, and the Sheriff at the End of his Year delivers him over to the new Sheriff by Indenture, in which Indenture the Execution at the Suit of *A.* only is mentioned, and the Execution at the Suit of *B.* omitted; this is an Eſcape, for which an Action lies againſt the old Sheriff, tho' *J. S.* continues in Priſon, for *eo inſtante*, that the old Sheriff hath delivered his Priſoners to the New, (i) he ceaſes to have the Cuſtody of them, and he cannot be in Cuſtody of the new Sheriff at the Suit of *B.* with which he was never charged; and tho' the Executions are of Record, yet the new Sheriff is not bound to take Notice thereof. *Mich.* 39 & 40 *El.* 3 *Co.* 71. (k) *Weſtby*'s Caſe, adjudged upon a Special Verdict *per totam Curiam.*

(i) And the new Sheriff is to be charged for an Eſcape after. Cro. Jac. 380. — But if a Priſoner is omitted out of the Indentures, and ſo not turned over at all, he remains in the Cuſtody of the old Sheriff. 1 Sid. 335. Noy 51. 2 Leon. 54. 2 Keb. 224. (k) Moor 688. pl. 951. S. C. Adjudged upon a Special Verdict, being found alſo that the old Sheriff gave no Notice of this Execution to the New, and affirmed upon a Writ of Error in the Exchequer-Chamber; but it is ſaid, that it ſeemed to the Juſtices, that Notice by Parol would have been ſufficient, tho' the Execution was not mentioned in the Indenture. Poph. 85. S. C. adjudged Cro. El. 365, 366. adjudged, and after affirmed upon a Writ of Error. Cro. Jac. 588. cited.

(l) For this vide my 1ſt Part 191.

4. (l) If a *Capias ad Satisfaciendum* againſt *J. S.* is directed to the Sheriff, and he thereupon makes a Warrant to the Bailiff of a Liberty, who takes

takes *J. S.* and after ſuffers him to eſcape, an Action lies againſt the (a) Bailiff of the Liberty, and not againſt the Sheriff. *Co. El.* 26. *per Curiam.*

(a) Againſt him and not againſt the Lord of the Liberty. Noy 69. —— But if the Bailiff be unable, the Lord muſt anſwer for him. 2 Brownl. 50. but for this vid. poſt Reſpondeat Superior, under this Title Eſcape.

5. If upon a Plaint levied in the Court of *B.* before the Bailiffs of *B.* according to the Cuſtom there, a Warrant is directed to the Under-Bailiffs to take *J. S. Ita quod habeant Corpus ejus coram Ballivis ad prox' Cur'*, and the Under-Bailiffs take him and commit him to Priſon, *ſub Cuſtodia* of the Gaoler of the Priſon; if they have him not at the Day, *&c.* an Action lies againſt them, and (b) not againſt the Gaoler, for there was no Commitment to him by any lawful Authority, and that Cuſtody the Gaoler had was only as a Servant to the Under-Bailiffs. *Trin.* 41 *El.* Between *Baldry* and *Jolinſon. Cro. El.* 743. adjudged.

(b) Whether upon an Eſcape of one in Execution upon a Capias ad Satisfaciendum, Debt lies againſt the Gaoler. Wainwryght and Griffith, Hard. 29, 30, &c. debated, but no Judgment.

6. (c) If upon a *Capias ad Satisfaciend.* iſſued againſt *A.* directed to the Coroners, it is delivered to one of them only, who in Perſon arreſts *A.* and ſuffers him to eſcape, and the others have no Notice thereof, whether he alone muſt be charged for this Eſcape, or whether making but one Officer, they ſhall all be charged. *Paſch.* 5 *Will.* between *Taylor* and *Clerk & al.* 3 *Lev.* 399. *dubitatur & adjornatur.*

7. (d) An Action lies for a voluntary Eſcape againſt the Gaoler as well as againſt the Sheriff, for it is in Nature of a Reſcue. *Paſch.* 12 *Will.* 3. *Salk.* 18. *per Holt* Ch. Juſt.

(c) Nayler and Sharpleſs like Point, 1 Mod. 198. 2 Mod. 23. and vid. Stil. 297. 6 Mod. 37. Comb. 435, 436.

(d) Salk. 441. S. P. per Holt Ch. Juſt.

(C) How the Priſoners ought to be (e) demeaned.

(e) Gaoler not bound to find Proviſions for them. 2 Roll. Abr. 32. B. 2. vid. and the Notes there.

Execution.

1. By the Law, a Priſoner in Execution ſhall not go at his Liberty in the Priſon, nor out of the Priſon with his Keeper, but ſhall be held ſtrictly * in Ward. D. 8 El. 249, 84. ſaid that Trin. 24 H. 8. a Decree and Order was made in Camera Stellata de adviſamento of Fitz-James and Norwich Chief Juſtices of the Benches, Fitzherbert and Spilman Juſtices accordingly; and an Injunction of this given to the Keepers of Priſons in all London, to obſerve the ſaid Order and Decree, upon Pain of 100 l.

* Fol. 807.

2. The Gaoler ought to keep Men in Execution (f) in ſalva & arcta Cuſtodia, and the Statute of Weſtm. 2. cap. 11. ſays, quod Carceri (g) mancipentur in ferris, ſo that the Sheriff may keep them that are in (h) Execution in Irons and Fetters, to the Intent that they may more readily ſatisfy their Creditors. Co. 3. Boyton 44.

(f) Cro. Car. 466. Co. Lit. 260. a.

(g) Quære, Whether that Statute extends further than to ſuch, who upon their Accounts before Auditors, are found in arrear. 2 Inſt. 381. A Man is not to be kept in Fetters, but for criminal Offences. 1 Bulſt. 145, 146. per Curiam agreed, and vid. 3 Inſt. 35. 2 Mod. 124. (h) He could not have kept them in Irons by the Common Law. 2 Inſt. 381. —— Impriſonment muſt be Cuſtodia & non pena. Co. Lit. 160. a.

3. If a Man in Execution in a Priſon acknowledges himſelf to be bound in a Bill obligatory to J. S. without his Aſſent, to the Intent that J. S. ſhall ſue in Banco, or other Courts, by which Judgment there may be againſt him by Confeſſion, upon which he may

may be there removed by Corpus cum cauſa, and there put in Execution in the Priſon there, which is not ſo ſtrait as the other Priſon; and this is done accordingly, and thereupon he is committed in Execution accordingly; yet upon Intelligence of this Deceipt by the Court, he ſhall be remanded. Dy. 8 El. 249. 84. Per Curiam adjudged, (a) and fined for the Deceipt to 10l. and a Vacat made of the Record.

(a) My 2 Part, 310. C. 1. vid. and M. the Practice at this Day.

4. So if a Man be in Execution in one Priſon at the Suit of a common Perſon, and becauſe he would have more Eaſe and Liberty, he acknowledges himſelf voluntarily, and upon a feigned Cauſe, to be a Debtor to the King, upon which he may be adjudged to the Priſon of the Fleet, to have more Liberty, and ſo to delay the Creditor of his Recovery, the Recognizance ſhall be recorded; (b) but if he was not at another Time indebted to the King, he ſhall be remanded to the firſt Priſon till Satisfaction of the Party, and afterwards he ſhall be ſent to the Fleet to ſatisfy the King. 1 Rich. 2. cap. 12.

(b) In the Statute at large it is, if he be not Debtor to the King of Record, vide.

(D) What Thing or Act will (c) excuſe an Eſcape.

(c) Where the Plaintiffs Conſent thereto by Parol. 2 Inſt. 382. — Defendant may plead Quod dedit Conſenſum. Gouldsb. 81.

1. (d) IF the Sheriff arreſts a Man upon a Latitat, or other Proceſs, if the Priſoner be reſcued from him before (e) he can bring him to Priſon, and he (f) returns the Reſcue againſt them who made the Reſcue; this ſhall excuſe the Sheriff from the Action upon the Caſe for the Eſcape, becauſe he is not bound; nor is it convenient for him to bring the Poſſe Comitatus with him, to ſerve every mean Proceſs. My Reports 14. M. (g) May againſt Proby and Lumley, adjudged 16 E. 4. 3. by all the Juſtices, contra 44 El. (h) Fallow againſt Lambert, B. R.

(d) 1 Jon. 201. The Difference where the Taking on mean Proceſs, &c. doubted by Jones and Whitlock; but vid. March 1. pl. 1. The Difference agreed by Jones and Berkley.

(e) Lutw. 130, 131.

(f) 2 Lev. 144. and 3 Lev. 46. S. P. adjudged, tho' the Defendant had not pleaded, that he had returned the Reſcue.

(g) Cro. Jac. 419. S. C. adjudged 1 Roll. Rep. 388, 440. S. C. adjudged, tho' it was agreed per Curiam, that the Sheriff may take his Poſſe to ſerve mean Proceſs. 3 Bulſt. 198, &c. S. C. adjudged Moor 852. pl. 1162. S. C. and S. P. per Curiam, 3 Lev. 46. S. C. cited.

(h) Waldoe and Lambert, S. C. Cro. El. 868. S. C. adjudged, Noy 40. S. C. adjudged, and ſaid that the Sheriff might take his Poſſe to arreſt one on mean Proceſs. Moor 852. S. C. cited. 1 Roll. Rep. 389. S. C. cited. 3 Bulſt. 198. S. C. cited.

2. But if the Sheriff takes a Man upon an Execution, as (i) upon a Capias ad Satisfaciend. and he is reſcued from him before he can bring him to Priſon, tho' he returns the Reſcue, yet this ſhall not excuſe him in an Action upon the Caſe for the Eſcape; for that he is to take the Poſſe Comitatus to ſerve it at his Peril, and the Party cannot have any new Execution. My Reports 14 Jac. (k) May againſt Probey and Lumley, per Curiam. 16 E. 4. 3. 6 H. 7. 12. Dyer 7 El. 241. 47.

(i) Or upon a Capias Utlegat. after Judgment. Cro. Jac. 419. 1 Roll. Rep. 389.

(k) Cro. Jac. 418. S. C. and S. P. per Curiam. 1 Rol. Rep. 388, 441. S. C. and S. P. per Curiam. 3 Bulſt. 198, &c. S. C. and S. P. per Curiam.

3. If a Sheriff takes a Man upon a Proceſs and carries him to Gaol, and after he is reſcued out of the Priſon, and he returns the Reſcue, yet this ſhall not excuſe him in an Action upon the Caſe againſt him for the Eſcape, for he ought to keep his Gaol at his Peril. (l) My Reports 14 Jac. per Curiam.

(l) Cro. Jac. 419. S. C. and S. P. per Curiam. 1 Rol. Rep. 388, 441. per Curiam. 3 Bulſt. 198, &c. S. C. and S. P. per Curiam.

4. If a Sheriff, upon a Capias in mean Process directed to him, take the Party, and bail him upon an Obligation, with Sureties for his Appearance, according to the Statute of 23 H. 6. and at the Day of Appearance returns a Cepi Corpus; and the Defendant does not appear; yet no Action lies against the Sheriff, because he was bound by Statute to bail him, and the Party has * no Remedy but to procure him to be fined, if he does not bring in his Body. Mich. 43 & 44 Eliz. B. R. Between (a) Bowles and Lassels, per Curiam, and there said, that a Judgment in Point was then vouched accordingly.

* Fol. 808.

(a) My 1 Part 180. pl. 17. S. C. which vide with the Notes there.

5. (b) If the Prison be broke by the King's Enemies, by which the Prisoners escape, this shall excuse the Escape, because the Gaoler could not resist this, nor hath Remedy over. Dy. 3 E. 6. 66. 15. 7 El. 241. 47. Co. 4. (c) Southcot 84.

(b) 1 Vent. 239. S. P. per Hale arguendo.

(c) Cro. El. 815. S. C. and S. P.

6. So if the Prisoners escape for a sudden Fire, this shall excuse the Escape, for this is the Act of God. Dy. 3 E. 6. 66. 15.

7. (d) If a Prison be broke by Rebels and Traitors within the Realm, by which the Prisoners escape, this shall not excuse the Escape, for there the Gaoler may have his Remedy over. Dy. 3 E. 6. 66. 15 Co. 4. (e) Southcot 84.

(d) 2 Vent. 239. S. P. per Hale arguendo.

(e) Cro. El. 815. S. C. and S. P. 2 Mod. 28. S. C. and S. P. cited.

8. If a Man is in Execution in the Fleet, or other Place, at the Suit of the King, and of a common Person, and the Warden or Gaoler, (f) by the Command of the (g) Lord (h) Chancellor and Treasurer, suffers him to go into his Country with a Keeper, to collect and levy Money, the sooner to pay the King, and he goes there accordingly, and returns to Prison again; yet this is an Escape as to the common Person, for this Act of the Chancellor and Treasurer cannot excuse the Escape, for the King himself cannot licence any Man to go with a Keeper, or otherways at large. Dy. 12. 13 El. 297. 24.

(f) Otherwise if Defendant, upon an Attaint brought is bailed, or by Order of the Justices brought to their Chambers. Cro. El. 5. and vide 1 Rol. Rep. 204. Kelw. 214. Bendl. 244. (g) So where the Plea was, that he was set at large by Writ of Privilege awarded by the Council of York, &c. it not appearing they had any Authority to award such Writ. Cro. El. 893. —— By the Master of the Rolls. 1 Leon. 145. and vide Salk. 273. 2 Bulst. 120. (h) Where by the Command of Justices of the Peace, because arrested coming to Sessions. 1 Brownl. 15. Clerk and Molineaux. 1 Levinz 159. Raym. 100.

9. If a Man in Execution in the Fleet procures an (i) Habeas Corpus in Trinity-Term, returnable in Michaelmas-Term next following, in any Court of Westminster, and in the mean Time goes into the Country about his Business or Recreation, and out of Prison, but with a Baston or Keeper; yet (k) this is an Escape. (l) 1 Car. Regis, Resolved in the lower House of Parliament, tho' upon a Conference between the higher and lower House of Parliament, it was prayed by the Prisoners of the Fleet, that Way should be given for an Habeas Corpus, for this Purpose, for this Vacation, in respect of the great Plague now in London; yet the Lower House of Parliament would not assent to give any Way to it against the Law, tho' two Parts in Three divided, (m) would have assented to it, because it was against the Law, and so they excused themselves to the Lords, and thereupon nothing was done by the Lords to whom the Petition was exhibited. Hobert's Reports 273.

(i) Where one having a Day Rule goes to Playhouses. 2 Show. 298, 299.

(k) For the Writ warrants no more than that he be brought out of Prison only for the Purpose in the Writ mentioned, and only for so much Time as in Judgment of Law shall be convenient and necessary for the Execution of the Writ; and no more. Hob. fol. 202. Cro. Car. 14. 466. Hut. 129. Hard. 476. —— Vid. 3 Co. 44. a. b. 1 Mod. 116. 2 Show. 208, 299. (l) Cro. Car. 14. same Resolution. (m) In the Original it is violent Assenter. Q. if not misprinted.

(a) Cro. Car. 466. Same Reſolution Hut. 129. The Opinion of the Judges, as ſigned by them.

(b) Baſton.

10. (a) Trin. 12 Car. B. R. declared by the Juſtices de B. R. that it was referred to them by the King, whether in regard of the Plague, an Habeas Corpus could be granted for Priſoners in Execution in the Priſon of this Court, and in the Fleet upon a Judgment in Banco & Scaccario; and that upon Conference had between all the Juſtices and Barons, it was reſolved, and ſo certified by them to the Lord Keeper, that if upon an Habeas Corpus granted, the Gaoler ſuffers Priſoners to go at large with a (b) Keeper, this is an Eſcape, and yet no Habeas Corpora ought to be by the Law for this Purpoſe; and they ſaid, that when the King was informed of their Opinions, he approved it well, and commanded that it ſhould be obſerved; and Juſtice Jones ſaid, that in the Time of Popham it was ſo reſolved by all the Juſtices; and ſo alſo at Reading Term 1 Caroli, and ſo alſo reſolved in 34 H. 8.

11. There is a Difference between the Cuſtody of one in Execution within the County or Franchiſe in which the Gaol lies, and of one without ſuch County or Franchiſe; for in the firſt Caſe, if the Gaoler conſents that one in Execution ſhall go out of Gaol for a Time, tho' he returns by the Time, it is an Eſcape; but where upon an *Habeas Corpus* ſuch Priſoner is to be brought to *Weſtminſter* by a Day, tho' in bringing him he may be out of his Cuſtody for ſome ſmall Time; yet it is not an Eſcape when the Command of the Writ is performed, by having him in Court at the Day. *Boyton's* Caſe, 3 *Co.* 44.

12. If a Man in *Suffolk* is taken in Execution upon a *Capias ad Satisfaciendum*, and before the Return thereof brought to *Weſtminſter*, and after at his Requeſt is carried to *Lambeth*, and at the Return of the Writ brought in Court according to the Command of the Writ; this is no Eſcape, tho' *Lambeth* is not in the Road from *Suffolk*, but out of the Way. *Mich.* 34 & 35 *El.* (c) *Boyton's* Caſe, 3 *Co.* 43, 44. adjudged.

(c) Moor 257. pl. 44. S. C. adjudged, 299. pl. 447. S. C. adjudged.

(d) Hob. 202. S. P. contra, James and Pierce S. P. in Conſequence. 1 Vent. 269. adjudged, 2 Lev. 132. adjudged, 3 Keb. 453. adjudged, and vid. Dyer 66. 275, 279.

13. (d) If the Marſhal of the *King's Bench* voluntarily ſuffers *J. S.* being in Execution, to eſcape, and he in a ſhort Time after returns to Priſon, and the Marſhal dies, and the Office deſcends to his Son and Heir *J. S.* being then actually in the Priſon, and ſo continues till (e) the Son permits him to eſcape; an Action for this Eſcape will lie againſt the Son; for tho' the Gaoler having once voluntarily ſuffered *J. S.* to eſcape, could not again take him in Execution, (f) yet the Plaintiff might. *Paſch.* 26 *Car.* 2. Between (g) *Lenthall* and *Leuthall*, 2 *Lev.* 109, 110. adjudged.

(e) For he might juſtify the Detaining of him, 6 Mod. 183. (f) Vid. my firſt Part 633, 634. 1 Roll. Abr. 902. pl. 8. with the Notes there, and vid. 1 Vent. 4. 269. 2 Jon. 21. (g) 3 Keb. 487. S. C. adjudged.

(h) 1 Show. 174. S. P. ſeems admitted, and vid. 1 Lev. 73.

14. (h) If one in Execution upon a *Capias ad Satisfaciendum* is ſuffered by the Sheriff to eſcape, and the Plaintiff afterwards aſſents thereto, yet he may have an Action againſt the Sheriff or retake the Party, for ſuch (i) ſubſequent Aſſent will not make it an Eſcape with the Plaintiff's Conſent. *Mich.* 4 *Will.* Between *Scot* and *Peacock*, *Salk.* 271. adjudged.

(i) Otherwiſe if the Conſent was precedent. Goulſ. 81. Cro. Car. 329. —— Tho' by Parol only, 2 Inſt. 382.

15. If one taken upon a *Capias ad Satisfaciendum*, at the Suit of *A.* aſſigns a Mortgage to the Under-ſheriff, for ſecuring the Money to him at a certain Day, and is thereupon diſcharged, and after a new Sheriff made, he pays the Money to the Under-ſheriff, who re-aſſigns the Mortgage; yet this ſhall not excuſe the Eſcape, for the Sheriff had no Power to take Security, or (k) even the Money. *Hill.* 9 *Will.* 3. Between *Langden* and

(k) Cro. El. 404. 1 Mod. 194. —— Tho' the Plaintiff could not be found to whom it might be paid. Tylor and Baker, 2 Jon. 97. this Matter pleaded, but by 2 Lev. 203. 3 Keb. 748, 788. The Action was not Debt againſt the Sheriff for an Eſcape, but againſt the Defendant upon the Judgment. 2 Show. 139.

Wallis, *Lutw.* 588, 599. agreed *per Curiam*, and adjudged, that the Executor of *A.* could not bring Debt for the Money againſt the Executor of the High Sheriff.

(E) Retaking upon freſh Purſuit, and what ſhall be ſaid freſh Purſuit.

(a) 1. IF a Man in Execution eſcapes without the Aſſent of the Gaoler, and the Gaoler (b) makes freſh Purſuit after him, (c) and retakes him before any Action is brought againſt him by the Party, this ſhall excuſe him againſt the Party at whoſe Suit he was in Execution.

(a) Ridgeway's Caſe S. P. 3 Co. 52. Poph. 41. Moor 660. pl. 902. Cro. El. 439.

Goulſ. 180. (b) That he ought to make ſuch freſh Purſuit. 3 Co. 52. a. b. Moor 660. and be in continual Travel to take the Priſoner. Poph. 41. (c) Where he finds him taken in Execution in another County. Vid. 1 Roll. Abr. 902. pl. 9. —— Where he may take him a Year after the Eſcape. Godb. 177.

2. (d) But in the ſaid Caſe, if the Party at whoſe Suit he was in Execution, brings * his Action againſt him for the Eſcape, and after the Action brought, the Sheriff retakes him upon freſh Purſuit; yet this ſhall not be any Bar of the Action well attached before. Mich. 2 Car. Between (e) Harvey and Sir George Reynell, adjudged upon a Demurrer, which intratur Trin. 2 Car. B. R. Rot. 1179.

* Fol. 809.

(d) Ridgeway's Caſe S. P. 3 Co. 52. b. adjudged, Cro. El. 439.

adjudged. Goulſ. 180. (e) 1 Jon. 145. S. C. adjudged, Noy 193. S. C. adjudged, Lat. 200. S. C. Godb. 433, 434. S. C.

3. If a Priſoner eſcapes out of Priſon by Negligence of the Keeper, and (f) is abſent for a Day and Night, and the Keeper does not know thereof; but after this, when he hath Notice thereof, he makes freſh Suit after him, and retakes him, this is a good freſh Suit to excuſe him. Mich. 16 Car. B. R. Between Hinton and Sir John Lenthall, adjudged per Curiam, upon Evidence at the Bar; where the Iſſue was, whether he immediately, after the Eſcape, made freſh Suit; and per Curiam ruled, that this ſpecial Matter was a good Proof of the Iſſue; ſcilicet, that he made freſh Suit according to the Iſſue. Intratur Trin. 16 Car. B. R. Rot. 627. Paſch. 11 Car. B. R. (g) Between Elton and Sir John Lenthal, in Debt upon an Eſcape, ſuch Iſſue being joined, and Evidence given, that the Priſoner eſcaped at nine of the Clock at Night; and the nett Day immediately after Notice, ſcilicet, at five of the Clock next Morning he made freſh Purſuit, and upon this the Priſoner was retaken; & per Curiam, this was a freſh Purſuit within the Iſſue.

(f) Where being out of Sight for two or three Days, not material. Ridgeway's Caſe, 3 Co. 52. a. b. Cro. El. 439. Moor 660. pl. 902. ſaid that in the antient Pleadings it was not uſual to plead freſh Purſuit within the View, but only freſh Purſuit. Poph. 41.

(g) 2 Rol Abr. 681. pl. 4. S. C.

4. (h) If a Priſoner in Execution eſcapes by Negligence of the Keeper, tho' he be retaken upon freſh Purſuit after an Action brought againſt the Sheriff for this Eſcape, by which he is in Execution again; (i) yet this ſhall not excuſe the Keeper, but the Plaintiff ſhall recover againſt him. Mich. 13 Car. B. R. Between Burford, Plaintiff againſt Some and Gaier, Sheriffs of Middleſex; adjudged upon Demurrer in an Action of Debt againſt them for an Eſcape. Intratur Trin. 13 Car. Rot. 1107.

(h) Ridgeway's Caſe, 3 Co. 52. a. b. Cro. El. 439. Harvy and Sir George Reynolds S. P. 1 Jon. 145. adjudged, Lat. 200. adjudged, Godb. 433, 434. adjudged, Noy 193. S. C. adjudged, Whiting and Sir George Reynold S. P. Cro. Jac. 658, 659. adjudged, 2 Rol. Rep 283, 284. adjourn'd.

(i) Where a Motion was made in ſuch Caſe to ſtay Proceedings, vid. Winch 35.

(F) In

(F) In what (a) Caſes the Sheriff or other Officer ſhall be charged for an Eſcape.

(a) For the Eſcape of one committed by Commiſſioners of Bankrupts for his refuſing to be examined as a Witneſs. My firſt Part 190. pl. 3.

1. IF I recover againſt J. S. and the Sheriff takes him before the Writ of Execution comes to him, and ſuffers him to go at large, he is not chargeable for this. (b) 18 E. 3. 35. b.

(b) Fitz. Barr 248. S. C.

2. If A. brings a Scire facias againſt B. upon a Recognizance in Chancery, and hath Judgment againſt B. and after it is entered upon the Record, that A. Elegit habere executionem per Fieri facias, and this is returned Nihil, and then it is entered, that A. proſecutus fuit a Writ of Capias againſt B. upon which B. is taken by the Sheriff, and after ſuffered by him to eſcape; in this Caſe no Action lies againſt the Sheriff for this Eſcape, (c) becauſe there is no Award of the Capias by the Court, but it is taken out without Warrant, and no Capias lies upon a Recognizance by the Law; and there not being any Award of the Capias, that ſhould be a Judgment, tho' erroneous; tho' if there had been ſuch Award, the Sheriff might well take Advantage thereof. Between the (d) Earl of Cumberland and Weaver, adjudged in a Writ of Error in Camera Scaccarii, which intratur Paſch. 44 El. Rot. 453. B. R. and the Judgment in Banco Regis reverſed.

(c) Otherways where after a Nichil returned on a Levari facias, the Court awarded a Capias ad Satisfaciendum, &c. Ognel's Caſe, 8 Co. 142. a.

cited, 2 Bulſt. 64. cited, and ſaid the Entry was as here, proſecutus fuit, &c. but for the Report of this Caſe, vid. Cro. El. 164. Moor 274. pl. 428. 2 Leon. 84. Savil 63. and vid. 1 Leon. 276. Cro. El. 576. 1 Brownl. 83, 118. Poph. 205. (d) Cro. Jac. 3. S. C. adjourned, Yelv. 42. S. C. by three Judges againſt One; and yet by the Report the Court awarded the Capias, 2 Bulſt. 63, 64, 65. S. C. adjudged pro Quer' in B. R. per totam Curiam, tho' it appears by the Caſe, that the Court did not award the Capias, but the Party procured it, —— and in this Caſe it was ſaid, that if a Capias ad Satisfaciendum iſſues againſt a Peer, and he is taken thereupon, and eſcapes, an Action lies againſt the Sheriff. 2 Bulſt. 65.

(e) 2 Mod. 29, 30. S. P. adjudged by three Judges againſt one, upon a Special Verdict; but yet vide Noy 45. 2 Show. 424. Lutw. 1569. a long Argument by Powel Baron, where this Point is ſettled.

3. (e) In an Action upon the Caſe in Banco Regis, againſt an Officer of an inferior Court for an Eſcape; if the Plaintiff declares, that he brought an Action againſt J. S. in the ſaid inferior Court (as in Kingſton upon Hull) upon an Obligation (f) made at Halifax, in Comitatu Eborum, and does not alledge this to be within the Juriſdiction of the ſaid inferior Court, and that upon this Judgment was given, and Execution granted, and the Defendant took him in Execution, and ſuffered him to eſcape; and thereupon he hath brought this Action; this Declaration is not ſufficient to charge the Defendant, becauſe it is not alledged that the Obligation was made within the Juriſdiction of the Court; for tho' the Action be tranſitory, yet this inferior Court having but a limited Juriſdiction of Things * ariſing within the Juriſdiction, (g) the Proceedings there were coram non judice, and wholly void, of which the Officer ſhall take Advantage in this Action, upon the Eſcape. Paſch. 15 Car. B. R. Between (h) Richardſon and Bernard, per Curiam, adjudged in Arreſt of Judgment, after a Verdict for the Plaintiff upon ſuch a Declaration. Intratur Trin. 14 Car. Rot. 1590.

* Fol. 810.

(f) Salk. 202. ſaid it would have been otherways if it had not appeared where made; and Lutw. 1567. it is ſaid, the Cauſe of Action by the Declaration appearing to be out of the Juriſdiction, was the Cauſe of this Action lying. Skin. 51. (g) 4 Inſt. 231. 3 Lev. 23, 234. (h) My ſecond Part 299. pl. 1. S. C. 2 Mod. 197. S. C. cited, 3 Lev. 23. S. C. cited.

(i) 2 Bulſt. 322. S. P. ſaid per Coke to be clear.

4. (i) If a Man recovers againſt two jointly, and takes both in Execution, and after one is ſuffered to eſcape, tho' the other continues

tinues in Priſon, yet Debt lies upon this Eſcape againſt the Sheriff, in which the whole Debt ſhall be recovered againſt him. (a) Norgate's Caſe adjudged, cited Trin. 13 Jac. B. R. per Coke.

(a) 1 Rol. Rep. 205. S. C. cited.

5. (b) If a Man recovers againſt Baron and Feme, and takes both in Execution, and after the Feme is ſuffered to eſcape, tho' the Baron continues in Priſon, yet Debt lies upon this Eſcape againſt the Sheriff, in which the whole Debt ſhall be recovered; for this was the Debt of the Feme, and ſhe is as fully in Execution as the Baron. Trin. 13 Jac. B. R. Between (c) Dr. Sutcliffe and Sir George Reynell.

(b) Whiting againſt Sir George Reynolds. S. P. Cro. Jac. 657. adjudged, 2 Rol. Rep. 282, and vid. 3 Bulſt. 150.

(c) 1 Rol. Rep. 204, 205. S. C. 2 Bulſt. 320. S. C. and S. P. by three Judges againſt one.

6. (d) If after the Year a *Capias ad Satisfaciendum* is taken out, and the Defendant thereupon arreſted, and after ſuffered to eſcape, Debt lies for this Eſcape, (e) tho' the Proceſs was erroneouſly awarded, for it was ſufficient to arreſt him, and the Sheriff may juſtify in an Action of falſe Impriſonment, and (f) therefore cannot let him at large. *Trin.* 32 *Eliz.* *Buſhe*'s Caſe, *Cro. El.* 188. adjudged.

(d) Shirley and Wright, S. P. Salk. 273. adjudged, Far. 29. adjudged.

(e) The Sheriff can take no Advantage of Error in the Proceſs. Cro. El. 893. 767. 2 Bulſt. 258. 8 Co. 142. Godb. 27. Noy 78. Cro. Jac. 280, 289. Stil. 232. 3 Mod. 325. Carth. 148. —— But otherwiſe if the Arreſt was void; as if the Arreſt, on which the Eſcape is ſuppoſed, is laid to be out of the County of which the Defendant is Sheriff. Cro. El. 877, and vid. Noy 51. 1 Brownl. 79. Ow. 72. 5 Mod. 413. —— If the Judgment for Error is reverſed, the Sheriff may plead Nul tiel Record. 8 Co. 142. b. 1 Saund. 39. 1 Lev. 95. (f) Tho' the Sheriff may juſtify the Execution of a Capias teſted out of Term, yet the Plaintiff ſhall not take Advantage thereof, ſo as to charge the Sheriff for an Eſcape. Far. 30. per Holt. Salk. 700. per Holt.

7. If one taken upon a Writ of *Excommunicato Capiendo* upon a Sentence in the Spiritual Court, for Non-payment of Money decreed for Tithes and Coſts, eſcapes, an Action will lie againſt the Sheriff; for tho' this is founded upon a Matter meerly Spiritual, yet the Proceſs iſſues out of a Temporal Court, and is directed to, and executed by a Temporal Officer, and the Damages conſequential thereupon Temporal. *Hill.* 6 *Will. & Mar.* Between *Slipper* and *Maſon*, *Lutw.* 121, 122. adjudged *per totam Curiam*, tho' it was confeſſed to be the firſt Action in this Caſe.

8. If one be taken upon a *Capias ad Satisfaciendum*, between the *Teſte* and Return whereof a whole Term intervenes, and the Sheriff ſuffers him to eſcape, an Action lies againſt him; for this Writ was not void, the Party not being prejudiced thereby; for he had no Day in Court, and muſt however lie in Priſon. *Trin.* 1 *Ann.* Between *Shirley* and *Wright*, *Salk.* 700. *per Holt.*

9. Otherwiſe where taken upon a *Capias ad Reſpondendum*, in which a Term intervenes between the *Teſte* and Return; for ſuch Writ is void, and by the Intermiſſion the Cauſe is (g) diſcontinued and out of Court, and ſo the Sheriff not chargeable. *Trin.* 1 *Ann.* Between *Shirley* and *Wright*, *Salk.* 700. *per Holt.*

(g) My ſecond Part 150.

10. If a Plaint is levied in the Sheriff's Court in *London*, by *A.* againſt *B.* who before was in the Counter on a former Plaint levied by *C.* Now *B.* is in Cuſtody at the Suit of *A.* and if ſuffered to eſcape, *A.* ſhall have an Action. Between *Jackſon* and *Humphrys*, *Trin.* 5 *Ann.* *Salk.* 273. adjudged.

11. If *A.* is in Cuſtody of the Sheriff of *Northumberland*, and the Sheriff being in *London*, another Writ againſt *A.* is delivered to him, by this *A.* is immediately in his Cuſtody upon this Writ. *Salk.* 274. *per Holt* C. J.

12. Otherwiſe if at the Time the Priſoner was out of his County; as if the Sheriff was bringing him to *Weſtminſter* upon an *Habeas Corpus*. *Salk.* 274. *per Holt* Ch. Juſt.

(G) To (a) whom it ſhall be ſaid an Eſcape.

(a) The Plaintiff may have an Action for an Eſcape on mean Proceſs, becauſe he is thereby prejudiced in his Suit. Cro. El. (b) Br. Eſcape 7. S. C.

1. IF a Man be taken upon a Capias pro fine, for denying his own Deed in an Action of Debt, and is ſuffered to go at large, he who recovered ſhall have Debt againſt the Sheriff, becauſe the Capias is ad reſpondend' tam nobis quam parti. (b) 7 H. 4. 4. b. adjudged.

2. So in a Recovery upon a Forger of Falſe Deeds, if the Defendant be impriſoned for the Fine at the Prayer of the King's Attorney, if he be ſuffered to go at large before Satisfaction to the Plaintiff, he may charge him for the Eſcape, becauſe he is in Execution to the Party upon the Taking at his Election, for he ought to be in Execution to the Party before at the Suit of the King, becauſe the Suit of the Party is the Original, and the Fine but acceſſory, becauſe of the Suit. (c) 7 H. 6. 6. b.

(c) Br. Execution 47. S. C.

3. But if a Man be taken upon a Capias pro Fine for the King, where no Capias lies in the Original, and ſuffered to eſcape before Prayer of the Party to be in Execution for his Damages, as for a Fine in an Aſſiſe, the Party ſhall not have an Eſcape againſt the Sheriff, (d) becauſe he was not in Execution for him before Prayer. Contra 18 H. 6. 19.

(d) 5 Co. 88. b. S. P. but for this vid. 1 Rol. Abr. 895. throughout.

(e) Moor and Sir George Reynolds S. P. Cro. Jac. 619. but Bridg. 67. it appears to have been an Action upon the Caſe.

4. (e) If a Capias ad Satisfaciendum iſſues upon a Judgment in an Action of Debt, and the Sheriff returns Non eſt inventus, and after a Capias Utlegat' Iſſues, upon which he is taken and impriſoned, and after he is let to go at large, the Party that recovered may have an Action of Debt for this Eſcape againſt the Sheriff, (f) for he was in Execution for him alſo, becauſe he could not have a new Capias ad Satisfaciendum. Mich. 41, 42 El. B. R. Between (g) Leighton and Walwyn, per Curiam.

(f) But if after the Year, (admitting) he could not be in Execution for him without Prayer; yet Caſe lies, for the Plaintiff was prejudiced by the Eſcape; for he ought not to be diſcharged till he found Sureties to ſatisfy the Plaintiff. 5 Co. 89. b. and vid. 5 Edw. 3. c. 12. (g) Garnon's Caſe, 5 Co. 88. S. C. The Capias Utlegat' being taken out and executed within the Year, Cro. El. 706, 707. S. C. adjudged, Moor 566. pl. 772. S. C. 1 Rol. Abr. 895. pl. 4. S. C. Yelv. 20. S. C. cited, Comb. 201. S. C. 5 Mod. 201. S. C. cited, 1 Rol. Abr. 895. S. C. vid. 1 Rol. Abr. 901, 902. and Notes there.

(h) Moor 641. pl. 882. S. P. adjudged, and vid. Lutw. 110, 111.

5. (h) If a *Capias Utlegat'* iſſues upon an Outlawry upon mean Proceſs, and the Defendant is taken, and ſuffered to eſcape, an Action upon the Caſe lies, becauſe the Plaintiff is thereby delayed of his Debt. *Hill.* 41 *Eliz.* Between *Bonner* and *Stokely*, *Cro. Eliz.* 652. adjudged upon Demurrer.

(i) 1 Rol. Rep. 47. S. C. Moor 834. pl. 1123. S. C. My 1ſt Part 190. pl. 9. S. C.

6. (i) If a Man is committed for refuſing to anſwer to Interrogatories by Commiſſioners of Bankrupts to him exhibited, a Creditor upon whoſe Petition the Commiſſion iſſued may bring an Action. *Trin.* 12 *Jac.* Between *Barns* and *Cary & al'*, 2 *Bulſt.* 236. adjudged.

(k) 1 Sid. 380. S. P. adjourned.

7. (k) If within the Year a *Capias ad Satisfaciendum* iſſues on a Judgment, and the Defendant is thereupon outlawed, and two Years after taken upon a *Capias Utlegatum*, and the Sheriff ſuffers him to eſcape, Debt will lie againſt him, for the Defendant was in Execution at the Suit of the Plaintiff, without Prayer, in as much as the Plaintiff was at the End of his Proceſs, and no Continuance nor *Scire facias* lay after the *Capias Utlegatum*, which being ſued at the Charge of the Plaintiff, imported an

Election of the Body. *Paſch.* 8 *Will.* 3. Between (a) *Wolf* and *Daviſon*, *Salk.* 318. adjudged.

(a) 5 Mod. 200. S. C. adjudged, Comb. 373. S. C. adjourn'd; and Holt Ch. Juſt. ſaid, he never underſtood the Diverſity taken in the Caſe, where within the Year, and where after.

(b) *Gaols.*

(b) Every County hath two Sorts of Gaols, one for Priſoners by the Sheriff taken for Debt, and this the Sheriff may appoint in any Houſe, or where he pleaſes; the other is for Breach of the Peace and Matters of the Crown, which is the County-Gaol. Latch 16. and vid. 1 And. 345. —— Where not to be newly erected, unleſs by Act of Parliament. 2 Inſt. 705. (c) Tho' the Sheriff may remove his Gaol from one Place to another within his Bailiwick, yet he muſt keep it and his Priſoners within it, and not ſuffer them to go at large out of the Priſon, tho' he himſelf attends them, &c. Hob. 202. Latch 16. Sid. 318. —— Where the new Sheriff was not bound to take Delivery of a Priſoner, but in the common Gaol of the County. Poph. 85. 2 Leon. 54. Hard. 30, 33. (d) Where ſaid the Admiral may chuſe his Priſon at his Pleaſure. Savil 12. N. Dyer 278. Margine. (e) Vid. Cro. Car. 210. as to new Building added to the Gate-houſe, 2 Bulſt. 56.

(H) In what (c) Places Priſoners (d) may be kept.

1. **THE Marſhal of the** King's Bench **cannot keep his Priſoners in other Place than where the** (e) **old Priſon is appointed, without Licence of the Court, tho' it be in Time of Plague.** Trin. 11 Car. B. R. per Curiam.

2. (f) **But the Court of King's Bench may by Rule appoint the Priſon to be kept in any Place in** England, **and upon this the Marſhal may bring his Priſoners there, but he ought to keep them there in Priſon, as before, and the Extent of the Priſon ought to be limited by Rule of Court alſo.** Paſch. 11 Car. B. R. per Curiam, **and then Liberty was given to Sir** John Lenthal **to make his Priſon at** Biſſeter **in the County of** Oxon, **and the Extent of it limited.**

(f) Cro. Car. 466. S. P. reſolved by the Judges, Hutt. 129, 136. vid. the Opinion of the Judges that this was the proper Method to be taken where the Priſoners were in Danger of the Infection by the Plague.

Eſcape.

(a) How to be charged.

(b) *Reſpondeat Superior.*

1. BY the Statute of *Weſtm.* 2. made the 13 *Edw.* 1. *cap.* 11. an Accountant found in arrear before Auditors, aſſigned by his Lord, may be committed to Gaol, and the Keeper muſt take Heed he do not ſuffer him to go out of Priſon without the (c) Aſſent of his Maſter, and if he do, and be thereof convict, he ſhall anſwer to the Maſter for (d) the Damages, *&c.* and (e) ſhall have Recovery by (f) Writ of (g) Debt; and if the Keeper is (h) not able to pay, his Superior that (i) (k) (l) committed the Cuſtody of the Gaol to him ſhall be anſwerable.

(a) Tho' the Marſhal of the King's Bench is an Officer of the Court, yet they would not order him to produce his Deeds to ſubject himſelf to an Action. 2 Show. 308. and ſaid they were inrolled, and vid. Skin. 114.

(b) My firſt Part 191. pl. 1. (c) May be by Parol, and a good Bar in Debt for an Eſcape. 2 Inſt. 382. Goulſ. 81. (d) Being in Nature of a Treſpaſs, it lies not againſt Executors. 2 Inſt. 382. Hard. 31. but Q. as to an Action of Debt, Goulſ. 90. and for this vid. under the Title Executors. (e) By the Equity of this Act before 1 Rich. 2. Debt lay for an Eſcape in other Caſes. 2 Inſt. 382. 2 Lev. 159. (f) Yet by the Equity of this Act a Bill of Debt lies. 2 Inſt. 382. My ſecond Part 279. pl. 5. (g) Before this Act, Caſe, not Debt, lay for an Eſcape of one in Execution. 2 Inſt. 382. 2 Lev. 15. — But now the Plaintiff may have one or the other. Cro. El. 767. Cro. Jac. 289. — But for an Eſcape on meſne Proceſs, Caſe only. 1 Vent. 7. (h) Where in a ſpecial Verdict it ought to be found he was not able at the Time of the Action brought, Plummer and Whitchcot, 2 Lev. 158. 1 Vent. 314, 315. 2 Jon. 61. 2 Mod. 127. (i) Intended where he that hath the Freehold or Inheritance commits the Cuſtody to another. 2 Inſt. 282. Savil. 11. — The Mayor and Citizens of London having the Shrievalty of London in Fee, the Sheriffs are Guardians under them, and removable at Will; and tho' the Sheriffs appoint a Keeper under them, yet ſuch Keeper is not within the Act, but the Sheriffs are the Guardians, and the Mayor and Citizens their Superiors; and there cannot be two Superiors within this Act. 2 Inſt. 382. (k) One ſeiſed in Fee of the Office of Warden of the Fleet grants it for Life, he ſhall anſwer for the Inſufficiency of his Grantee. Plummer and Whitchcot, 2 Lev. 158. 1 Vent. 314, 315. 2 Jon. 61, 62. 2 Mod. 119, 120, &c. (l) This extends not where he makes a Deputy, for there he is chargeable, and not the Deputy. 2 Lev. 159.

2. By the Statute 1 *Rich.* 2. *cap.* 12. (m) The Warden of the *Fleet* ſhall not ſuffer a Priſoner in by Judgment to go at large by Mainprize, Bail or Baſton, without agreeing with the Party for the Thing adjudged, unleſs by Writ or other Command of the King, on Pain of loſing his Office; and being attainted thereof by due Proceſs, the Plaintiff ſhall recover againſt the Warden by (n) Writ of Debt.

(m) This extends to all other Gaolers, &c. Pl. Com. 36. b. 37. a. 1 Lev. 159. 2 Jon. 62.

(n) Yet by the Equity of this Act a Bill of Debt lies. 2 Inſt. 382. My ſecond Part 279. pl. 5.

Pleader.

(a) (b) *Declaration.*

1. (c) IF there are Three in Execution jointly at the Suit of *A.* and all eſcape, in Debt for the Eſcape, the Plaintiff may declare for the Eſcape of all, and it will not be double, tho' the Eſcape of any one of them (d) will be ſufficient to intitle him to the Action. 20 *H.* 7. *Kelw.* 68.

(a) In an Action for an Eſcape on meſne Proceſs, the Plaintiff muſt not only ſhew, that ad largum ire permiſit, but alſo that Non comperuit ad diem, because the Party being bailable, the Sheriff might lawfully ſuffer him to go at large, tho' in ſuch Action upon an Eſcape after Execution, it is ſufficient to ſhew that ad largum ire permiſit. Noy 72. per Curiam. —— In an Action brought by a Creditor for ſuffering one to eſcape who was committed by Commiſſioners of Bankrupts, for refuſing to anſwer to Interrogatories, the Plaintiff need not ſhew what the Interrogatories were, or that his Debt is not ſatisfied. Barns and Cary, 1 Rol. Rep. 47. Moor 834. pl. 1123. 2 Bulſt. 236. —— Where the Plaintiff declared for an Eſcape upon a Latitat, without ſhewing out of what Court it iſſued. 5 Mod. 413. (b) For what is neceſſary to be ſhewed in Declaration vid. Lutw. 110, 111. Carth. 149. 2 Show. 17. Salk. 272. 5 Mod. 414, 415. (c) Stil. 82. ſuch a Declaration. (d) And ſo perhaps may be on ſuch Declaration. 1 Sid. 5. Skin. 583. —— Where the Plaintiff declared for an Eſcape after Judgment, and before Execution, and upon Evidence it appeared to be before Judgment. Skin. 583.

2. If one recovers a Judgment as Adminiſtratrix of *J. S.* and thereupon takes the Defendant in Execution, and the Sheriff ſuffers him to eſcape, the Plaintiff cannot bring an Action for this Eſcape as Executrix of *J. S.* for the Action for the Eſcape (e) ought to (f) purſue the firſt Action, and ſuch Action brought as Executrix diſaffirms the firſt Suit, which ſuppoſes a dying Inteſtate. *Hill.* 13 *Jac.* Between (g) Sir *Henry Slingsby* and *Lambert* and his Wife, *Cro. Jac.* 394. adjudged upon a Writ of Error, and the Judgment reverſed accordingly.

(e) 2 Saund. 101. — If one declares for an Eſcape in a Cauſe of Action to 40 s. and proves 30 s. this is ſufficient. 2 Lev. 85. per Hale; but in the Book there is a Quære de hoc, being ſpecial. (f) One declares for an Eſcape upon a Latitat in placito tranſgreſſionis, and the Latitat produced was in placito tranſgreſſionis ac etiam Billæ 20 l. 2 Levinz 85. per Hale, 'tis an incurable Fault. (g) 3 Bulſt. 112, 113. S. C. debated and adjourned, and ſaid to have been afterwards ended by Agreement. 1 Rol. Rep. 276, 277. adjudged, Godb. 262. S. C. but the Opinion of the Court ſaid to be otherwiſe.

3. In an Action of Debt for an Eſcape of one in Execution, it is not ſufficient to ſhew only that a *Capias ad Satisfaciendum* iſſued, by Virtue of which he was taken, *&c.* but the Plaintiff muſt ſhew (h) how he recovered Judgment, and thereupon a *Capias ad Satisfaciendum* iſſued, *&c.* for as to the Judgment, the Defendant may plead *Nul tiel Record*; and tho' if there was no Judgment, the Sheriff was bound to execute the Writ, and perhaps might be fined for the Eſcape; yet if there was no Judgment, there was no Debt or Duty to the Plaintiff. *Mich.* 18 *Car.* 2. Between (i) *Jones* and *Pope*, 1 *Saund.* 38, 39. *per totam Curiam.*

(h) The Cauſe for which arreſted muſt be ſhewed and proved. 2 Levinz 85. (i) 1 Sid. 305, 306. S. C. adjudged, 1 Lev. 191. S. C. adjudged, 2 Keb. 93, 94. S. C. adjudged.

4. If in an Action for the Eſcape of *B.* againſt the Warden of the *Fleet*, the Plaintiff declares that *B.* was (k) committed in Execution to him, and he (l) muſt conclude *prout patet per Recordum*, for that is triable by the Record. *Hill.* 5 *Will. & Mar.* Between *Norden* and *Fox*, 3 *Lev.* 393. admitted *per Cur'*, tho' ſaid to be helped by the Defendant's Pleading, that he ſuffered him to eſcape with the Leave of the Plaintiff.

(k) The Marſhal of the King's Bench is not by the Committur chargeable with the Eſcape, unleſs actually in Cuſtody. 1 Sid. 220. —— Nor then till ſerved with a Rule or Entry thereof in the Marſhal's Book. Salk. 273. —— Where Committur muſt be proved, or not. 1 Sid. 237. (l) But Q. for this is only Matter of Inducement, and the Defendant is not thereby eſtopped. 5 Mod. 8, 9. vid. Lutw. 111.

Plea.

1. (a) IN Debt for an Eſcape of one in Execution upon a Judgment, the Defendant may plead *Nul tiel Record. Hob.* 209. Between (b) *Madox* and *Young*, adjudged upon Demurrer.

(a) Coachman and Halley S. P. appears Hob. 179. 1 Brownl. 68. and vid. Kelw. 18. b. 8 Co. 142. b. 1 Saund. 38.

(b) 1 Brownl. 51. S. C.

2. If in an Action upon the Caſe againſt the Marſhal of the *King's Bench* for an Eſcape, the Plaintiff declares, that he recovered a Debt and Damages againſt *J. S.* and that he was thereupon committed to the Defendant in Execution, and that the Defendant *apud* D. *in Com'* H. ſuffered *J. S.* to eſcape, the Defendant may plead that *J. S.* was in his Cuſtody at *S.* and that he ſuffered him to eſcape, and after retook him on freſh Purſuit, (c) without traverſing the Eſcape in the County of *H.* for when he was at large it was an Eſcape in (d) every County. *Mich.* 2 *Car.* (e) Between *Harvey* and *Reynolds*, 1 *Jon.* 144. agreed *per Curiam.*

(c) 4 Leon. 69. 3 Co. 52. b. Poph. 42. Dyer 66. b. 278. b.

(d) Pl. Com. 37. b.

(e) Latch 201. S. C.

3. If the Plaintiff declares upon a voluntary Eſcape, the Defendant may ſhew a negligent Eſcape and taking upon freſh Purſuit, without any Traverſe of the (f) voluntary Eſcape. *Trin.* 2 *Car.* Between (g) *Harvey* and Sir *George Reynolds*, *Latch* 201. adjudged.

(f) The Voluntarineſs is impertinent, and out of Time alledged, and therefore not traverſable. Sir Ralph Bovy's Caſe, 1 Vent. 211, 217. adjudged, 3 Keb. 55. adjudged, Lutw. 382. cited, and vid. under the general Title Pleading, Where Surpluſage and Matter alledged out of Time is not traverſable.

(g) Noy 93. S. C. adjudged.

Exchange.

Permutation.

Fol. 811.

(A) Of what Things it may be.

1. AN Exchange cannot be of a lay Hospital for a Provandry, because one is lay and the other Spiritual. (a) 21 E. 3. 6. b. 7. (a) Br. Exchange 11. S. C.

2. But otherways it is if the Hospital be Spiritual, as where it is founded for Alms and Spiritual Things. (b) 21 E. 3. 7. (b) Br. Exchange 11. S. C.

(B) What Person may make an Exchange at what Time.

1. IF two Husbands and Wives make an Exchange between them, this is good during the Coverture. (c) 45 E. 3. 20. b. (c) Fitz. Exchange 1. S. C. Br. 2. S. C.

2. If an Infant exchanges for Lands of less Value than his Lands which he gives in Exchange, this will not bind him. 12 H. 4. 12.

3. But at his full Age he may make this good by Agreement. (d) 12 H. 4. 12. 4 E. 2. Eschange 3. (d) Br. Exchange 3. S. C. Fitz. Enfant 4. S. C.

4. An Exchange by an Infant is good till he defeats it. 15 E. 4. 3.

5. But he may avoid it at his full Age. 4 E. 2. Eschange 3. Admitted by the Issue. 16 E. 3. F. Eschange per Shard 2. admitted.

6. If Baron and Feme exchange with another, this is good during the Coverture. 39 E. 3. 30.

7. If the Husband exchanges the Land of the Wife, for Lands of less Value, if the Wife, (e) after his Death, once agrees to the Exchange, she shall never avoid it after. (f) 9 H. 6. 52. Curia. (e) And tho' the Husband and Wife by Fine alien the Lands taken in Exchange, yet the Wife after the Death of her Husband, may enter into her own Lands, for the Time of her Election was not before come. 1 Leon. 285. (f) Br. Eschange 9. S. C.

8. If the Husband exchanges the Land of the Wife for other Lands given to his Wife and their Son jointly, this shall be good by the Agreement of the Wife, after the Death of the Husband. 9 E. 2. Cui in vita 28.

9. If

9. If Baron and Feme exchange the Land of the Wife for other Lands, this shall be a good Exchange not to be avoided by the Wife, if she agrees thereto after the Death of the Husband. 10 E. 2. F. Exchange 13.

(a) Co. Lit. 51. b. S. P. Dal. 64. per Bendl. S. P.

10. (a) If an Infant exchanges Lands with another, if he continues in the Land given to him in Exchange at his full Age, he hath affirmed the Exchange, and shall never avoid it afterwards. 4 E. 2. Exchange 3. admitted by the Iſſue. 16 E. 3. Eſchange 2. per Sharde.

(b) And the King is thereby bound to Warranty, and yield in Value. 2 Inſt. 269.

11. An Exchange with the King is (b) good, tho' he is ſeiſed in his politick, and the Subject in his natural Capacity. *Co. Lit. 51. a.*

12. If a Parſon before the 13 *El.* had exchanged his Glebe-Land for other Land, and his Succeſſor had entered into the Lands taken in Exchange and took the Profits, the Succeſſor ſhould have been bound by his Time. *Turther's* Caſe, *Noy* 5. adjudged.

13. Otherways in Caſe of an Exchange made after the 13 *El. Noy* 5. *per Curiam.*

(C) What Perſons may in Reſpect of their Eſtates.

(c) Br. Eſchange 13. S. C.

1. If Tenant in Tail exchanges for other Lands of equal Value, the Iſſue may avoid it. (c) 14 H. 6. 2, 3.

(d) Br. 13. S. C.

2. If Tenant in Tail exchanges for Lands of equal Value, and dies, tho' the Lands taken in exchange deſcends to his Iſſue, yet if the Iſſue does not occupy it, but diſagrees thereto, he may avoid the Exchange. (d) 14 H. 6. 2, 3.

* Fol. 812.

(e) Br. Tail 34. S. C.

3. If Tenant in Tail exchanges with another, and leaves other Lands to deſcend to his Iſſue in Fee, this ſhall bind the Iſſue. 8 H. 6. 23. 14 H. 6. 23. * For then there is a lineal Warranty with Aſſets. (e) 45 Aſſ. 6. adjudged.

4. If Tenant in Tail exchanges for Lands of leſs Value, if the Iſſue after his Death once agrees thereto, he ſhall never avoid it. 9 H. 6. 52. b. Curia. So it is a fortiori where the Land which he hath in Exchange is of equal Value. 14 H. 6. 2, 3.

(f) For in the Caſe of an Exchange there needs no Livery, but only a reciprocal Execution of both Parties, by Entry. Far. 25. per Ch. Juſt. Holt.

5. It is not neceſſary that the Parties to the Exchange be ſeiſed of an equal Eſtate at the Time of the Exchange made; for if Tenant in Tail, or an Husband ſeiſed in the Right of his Wife, exchange Lands, and (f) both by the Exchange give a Fee-ſimple, this is good until it be avoided by the Wife, or the Iſſue in Tail after the Death of the Huſband. *Co. Lit. 51. a.*

6. So if the Land of one be of a defeaſible Title, and the Land of the other of an indefeaſible Title, yet the Exchange is good till it be avoided. *Co. Lit. 51. a.*

(D) Of what Things it may be.

1. (a) A Rent may be exchanged with another for certain Land. 16 E. 3. Eschange 2. (b) 3 E. 4. 10. b. (c) 9 E. 4. 21. 15 E. 4. 8. b. 30 E. 1. Itinere Cornubiæ 15. Co. Lit. 50. b.

(a) Moor 665. pl. 909. S. P. (b) Fitz. Exchange 10. S. C. (c) Fitz. Exchange 5. S. C.

2. (d) A Man may exchange Common for Land. Perkins, Sect. 263. Co. Lit. 50. b. Contra 15 E. 4. 3.

(d) Moor 665. Pl. 909. S. P.

3. A Tenure by Divine Service may be exchanged for a Temporal Seigniory. Co. Lit. 50. b.

4. A Common may be exchanged for Tithes. Contra 15 E. 4. 3.

5. Land may be exchanged for Tithes. Co. Lit. 50. b.

6. An Annuity cannot be exchanged for Land, because this charges the Person only, and is not real. Co. Lit. 50. b.

7. A Villein in gross may be exchanged for an Acre of Land, for the Villein is real as well as the Land; for a Woman shall be endowed thereof, and an Estate-tail may be thereof within the Statute.

8. A (e) Reversion expectant upon an Estate for Life may be exchanged for an Acre in Possession. 9 E. 4. 39. Per Littleton Co. 4. (f) Bustard 122. b.

(e) And such Reversion may be exchanged for an Acre in Possession. Mid. 4 Co. 122. b. Yelv. 8. S. C. and S. P.

(f) Cro. El. 902. S. C. and S. P. Moor 665. pl. 909. S. C. and S. P.

9. If I have a Rent out of certain Land, I may exchange this Rent with the Tenant of the Land by Way of Release of the Rent for other Land, tho' there be no Transmutation of the Possession of the Rent, but this shall enure by Way of Extinguishment. 16 E. 3. Eschange 2. Per Skipwith, Perkins, Sect. 267. Co. Lit. 50. b.

10. So a Man may release a Common of Estovers to the Tenant of the Land in Exchange for other Lands, tho' this enures by Way of Extinguishment, and it shall be a good Exchange. 30 E. 1. Itinere Cornubiæ, Eschange 16. adjudged Co. Lit. 50. b.

11. So Common of Pasture may be released to the Tenant of the Land in Exchange for other Land, tho' this enures by Way of Extinguishment.

12. If J. S. be seised of certain Lands to which I have a Right of Entry, I may release this Right to J. S. in Exchange for other Lands, and this shall be a good Exchange, tho' there is no Transmutation of the Possession. Perkins, Sect. 271. Co. Lit. 50. b. contra. 7 H. 4. 43. dubitatur. (g) 3 E. 4. 10. b.

(g) Fitz. Exchange 4. S. C.

13. So a Right of Action may be released to the Tenant of the Land in Exchange for other Lands, and this shall be a good Exchange, for he to whom the Release is made hath as good Advantage thereby as if the Land it self had been given to him. Dubitatur 16 E. 3. Eschange 2. Perkins, Sect. 268.

(E) Of what Things it may be for a collateral Reſpect.

1. BOth the Things which are exchanged ought to be in eſſe at the Time of the Exchange, otherwiſe it will not be good.

(a) Fitz. Exchange 5.S.C. (a) 9 E. 4. 21. b. Per Choke, Perkins, Sect. 262. contra Co. Lit. 50. b.

2. As if a Man grants a Rent de novo out of his Land to another in Exchange for certain Land; this is not good, becauſe the

(b) Fitz. Exchange 5.S C. Rent was not in eſſe before. (b) 9 E. 4. 21. b. Per Choke contra, Co. Lit. 50. b.

Fol. 813.

(F) What Eſtates the Parties to the Exchange ought to have.

1. TWO may exchange, and for Equality one may by Deed reſerve out of the Land which he paſſes, a Rent for Equality, and for Surety of Payment, a Re-entry on Non-payment. Dubita-

(c) Fitz. Exchange 1.S.C. tur. (c) 45 E. 3. 20. b. For it ſeems this is but a collateral Incumberance upon the Eſtate.

(G) Of what Eſtates it may be.

(d) Lit. Sect. 64. S. P. 1. (d) THE Eſtates which are given in Exchange ought to be (e) equal one to the other. (f) 9 E. 4. 21. b. 38. b.

(e) Equality of Value, or of the Manner of the Eſtates, ſo there be an Equality of the Eſtates given in Exchange, not material. Co. Lit. 51. a. Moor 665. pl. 909. Dyer 356. pl. 40. (f) Fitz. Exchange 6. S. C. Br. Exchange 6. S. C.

2. An Exchange of Land for Life for Land in Fee, is not good,

(g) Fitz. Exchange 8.S.C. becauſe the Eſtates are not equal. (g) 38 E. 3. 15. b. 30 E. 1. Itinere Cornubiæ 15. adjudged, 22 E. 3. 15.

3. A Man may give an Eſtate for the Life of the Donee in Exchange for an Eſtate pur auter vie, for the Eſtates are equal, both being Eſtates of Freehold.

4. It ſeems an Eſtate for three Lives may be given in Exchange for an Eſtate for one Life, for both are Eſtates of Freehold, and ſo equal.

5. An Eſtate may be given to one and his Heirs, for the Life of J. S. in Exchange for an Eſtate pur auter vie, for both are but Eſtates of Freehold.

6. It ſeems an Eſtate cannot be given to another and his Heirs for the Life of J. S. in Exchange for a baſe Fee, as ſo long as J. S. ſhall have Iſſue of his Body, or as ſuch Oak ſhall grow, becauſe the Eſtates are not equal.

7. An Eſtate to one and his Heirs, ſo long as J. S. ſhall have Iſſue of his Body, may be given in Exchange for an abſolute Fee, for both are Eſtates of Fee-ſimple, tho' one be but a baſe Fee.

8. So an abſolute Fee may be given in Exchange for an Eſtate to another, and his Heirs, ſo long as ſuch an Oak ſhall grow, for both are Fees.

9. A Villein may be given in Fee in Exchange for an Acre in Fee, tho' he hath but a baſe Fee in the Villein, ſcilicet, ſo long as he ſhall have Iſſue of his Body. Note; This was held for a Point in a Moot in the Hall.

10. Tenant in Tail may give the Land to another and his Heirs, in Exchange for another Acre to him, ſo long as J. S. ſhall have Iſſue of his Body, for both are Eſtates in Fee.

11. So it ſeems that Tenant in Tail may give the Land in Exchange for other Land to him in Fee, for both are Fees.

12. A Reverſion in Fee expectant upon an Eſtate for Life may be given in Exchange for Land in Poſſeſſion in Fee, for the Eſtates are equal, for each had a Fee. (a) 9 E. 4. 39. per Littleton, Co. 4. (b) Buſtard 122. b.

(a) Fitz. Exchange 6. S. C. (b) Cro. El. 902. S. C. and S. P. Moor 665. pl. 909. S. C. and S. P. Yelv. 8. S. C. and S. P.

13. If two Jointenants give Land to other two Jointenants for Land given to them in Common, this is good; for the Eſtates are equal, tho' they differ in Quality. Co. Lit. 51.

14. So if Two give Land to one, in Exchange for Land given to them Two, this is good. Co. Lit. 51.

15. (c) An Exchange between a bare Tenant for Life, and Tenant in Tail, after Poſſibility of Iſſue extinct, is good, for their Eſtates in Reſpect of the Quantity are equal, and the Difference in the Quality only. *Co. Lit.* 28.

(c) 11 Co. 80. b. S. P.

(H) By what Words.

1. AN Exchange is not good, if it be not made by this Word (d) Excambium. (e) 9 E. 4. 21. b. Perkins, Sect. 253.

Fol. 814.

(d) The Word Exchange is ſo appropriated by Law, that it cannot be expreſſed by any Peripiaſis or Circumlocution. Co. Lit. 50. b. 51. b. 1 Rol. Rep. 122. Hob. 41. (e) Fitz. Exchange 5. S. C. Br. Eſchange 5. S. C.

(I) How an Exchange may be made where without Deed, in Reſpect of the Thing.

1. (f) IF the Lands lie in one County, it may be made without Deed, for the Exchange is a Livery in Law. (g) 45 E. 3. 21.

(f) Lit. Sect. 62. S. P. (g) Fitz. Exchange 1. S. C. Br. 2. S. C.

2. (h) But if they be in two Counties, it ought to be by Deed. (i) 45 E. 3. 20. b. 15. 7 H. 4. 11 Co. 9. Dowman 14. (k) 9 E. 4. 38. b. Co. Lit. 51. b. by Deed indented.

(h) Lit. Sect. 63. S. P. and vid. 9 Co. 12. a. 14. a. (i) Br. Eſchange 2. Fitz. 1. (k) Br. Eſchange 6. S. C. Fitz. 6.

3. If Land in Ireland be exchanged for (l) Land in England, it ought to be by Deed tempore E. 2. 71. b.

(l) That ſuch Exchange may be, vid. Lat. 234.

4. If

4. If the Thing exchanged lies in Grant, tho' it be in one County, yet it ought to be by Deed indented. Co. Lit. 51. b.

5. Two may exchange Land, and for Equality one may reserve a Rent for Equality. (a) 45 E. 3. 20. b. admitted.

(a) Fitz. Exchange 1. S.C.

6. Two may exchange Land, reserving a Rent for Equality upon Condition, that if the Rent be arrear, that he may enter into his Acre given in Exchange. (b) 45 E. 3. 20. b.

(b) Fitz. Exchange 1. S.C.

7. If there be a Discourse of an Exchange of certain Lands between Two, and after one enters into the Land he ought to have, and levies a Fine to the other of the Lands he ought to have, without saying any Thing in the Fine of an Exchange; this is no good Exchange, because the Land passes by the Fine. (c) 45 E. 3. 20. b.

(c) Fitz. Exchange 1. S.C. Br. 2. S. C.

8. Two may exchange Lands by two several Fines, for the one may upon a Writ of Covenant brought against him by the other, (d) acknowledge all his Right, and render his Acre to the other in Exchange for another Acre, and so the other may do in another Writ of Covenant brought against him by the other. 16 E. 2. Eschange 14.

(d) In the Original it is Conustre.

(K) At what Time it ought to be executed.

1. If two Parsons (e) exchange their Churches the one with the other, this ought to be executed on both Sides during their Lives; otherways the Permutation will be void. (f) 45 E. 3. Fitz. Eschange 10. adjudged.

(e) In the Original it is permute.

(f) Hob. 152. S. C. cited, 2 Co. 74. b. S. C. cited.

2. For if one be inducted into the Church which is given to him, and the other dies before Induction, the Permutation is void. (g) 45 E. 3. Eschange 10. adjudged.

(g) Hob. 152. S. C. cited, 2 Co. 74. b. S. C. cited. —— and vid. Ow. 12. 3 Mod. 135.

3. (h) If Two exchange Lands, and one of them dies before (i) Entry, the Exchange is void; the Heir cannot be taken as a Purchaser, because he was named only to take by Way of Limitation of an Estate in the Course of Discent. Co. Lit. 50. b.

(h) 1 Co. 105. S. P.

(i) To the Perfection of an Exchange it is absolutely necessary that there be an Entry or Claim in the Life of the Parties. Co. Lit. 51. b.

(L) How it shall be executed, and what shall be said an Execution.

1. If an Exchange be made of Land, the Exchange is not perfect till an Entry made by the Parties. Co. Lit. 51. a. b.

2. If two Parsons exchange their Churches the one with the other, this shall be executed by Presentation of their Patrons, and their Admission, Institution and Induction. (k) 45 E. 3. Fitz. Exchange 10. adjudged.

(k) Hob. 152. S. C. cited, 2 Co. 74. b. S. C. cited. —— And vid. Ow. 12.

3. But this is not executed until they are inducted into the Churches, according to the Permutation. (a) 45 E. 3. Fitz. Exchange 10. adjudged. Fol. 815.

(a) Hob. 152. S. C. cited, 2 Co. 74. b. S. C. cited.

4. (b) If an Infant exchanges Land, and at full Age occupies the Land taken in Exchange, the Exchange is become perfect thereby; for the Exchange at first was not void, because it amounted to a Livery, and also in Respect of the Recompence, but only voidable. Co. Lit. 51. b.

(b) Far. 25. S. P. per Holt Ch. Just. ante B. pl. 10. S. P.

(M) How it shall enure, what Estate.

IF Two exchange Lands together, without limiting any Estate, they shall have but Estates for their Lives. 19 H. 6. 27.

(N) (c) What Act or Thing will defeat an Exchange.

(c) If two Women exchange Lands; and one marries before Entry, this shall not defeat the Exchange. 1 Vent. 186. 1 Mod. 91. 2 Keb. 872, 881.

1. (d) IF A. exchanges a Manor with B. for another Manor, and after Part of the Manor which he gives is evicted from B. by an elder Title, B. may enter into the whole Manor which he gave, and this shall defeat the Exchange in the Whole, because the Condition is intire. (e) 13 E. 4. 3. b. by all the Judges.

(d) Co. Lit. 173. b. S. P. (e) Fitz. Exchange 7. S. C. Br. 8.

2. (f) So if A. exchanges two Acres with B. for two Acres, and after one of the Acres is evicted from B. B. may enter into the whole Land which he gave in Exchange, because the Condition is intire. (g) Co. 4. (h) Bustard.

(f) Co. Lit. 173. b. 174. a. S. P. (g) 4 Co. 121. b. S. C.

(h) Cro. El. 902, 917. S. C. adjudged, Moor 665. pl. 909. S. C. adjudged, Yelv. 8. S. C. adjudged.

3. (i) So when an Estate of (k) Freehold in the Whole, or in Part of the Lands given in Exchange, is evicted, the whole Exchange may be defeated by Force of the Condition in Law, for the whole Estate given was the Consideration of the other's Parting with his Land. 4 *Co.* 122. *b.* Resolved in (l) *Bustard*'s Case.

(i) Co. Lit. 174. like Point in Case of a Partition between Parceners.

(k) So if a Term for Years be evicted. Cro. El. 902. Yelv. 8. per Popham. S. C. adjudged, Moor 665. pl. 909. S. C. adjudged, Yelv. 8. S. C. adjudged.

(l) Cro. El. 902, 917.

(O) (a) Defeating of Exchanges.

(a) Two Women make an Exchange of Lands, and then one of them marries before Entry, and whether this ſhall defeat the Exchange, 1 Mod. 91. **dubitatur.**

1. (b) IF one enters by Wrong upon another with whom he hath Exchanged, this ſhall not defeat the Exchange, for the other cannot enter upon him in his Acre, but is put to his Aſſiſe. (c) 15 E. 4. 3. 9 E. 4. 20. b. per Curiam.

(b) 1 Rol. Rep. 122. S. P. **arguendo.** Hob. 41. S. P.
(c) Br. Eſchange 12. S. C.

(d) Br. Eſchange 12. S. C.

2. The ſame Law if a Stranger enters by Wrong. 9 E. 4. 21. (d) 15 E. 4. 3.

(e) Hob. 41. S. P.

3. (e) But if one enters upon a good Title upon the other, and defeats his Acre, as for that at the Exchange he was an Infant, Feme Covert, or the like, this ſhall defeat the Exchange, and the other may enter into his Acre. (f) 15 E. 4. 3.

(f) Br. Eſchange 12. S. C.

4. The ſame Law if a Stranger enters upon an elder Title. (g) 15 E. 4. 3.

(g) Br. Eſchange 12. S. C.

5. If a Man exchanges a Villein for an Acre of Land, and after the Villein dies without Iſſue, yet the Exchange is not defeated; for when the Exchange was good at the Exchange made, this ſubſequent Matter, which does not come by Relation before the Exchange, but is ſubſequent to the Exchange, cannot defeat the Exchange as an Eviction.

6. So if a Man gives a baſe Fee, ſcilicet, ſo long as J. S ſhall have Iſſue of his Body, in Exchange for an abſolute Fee, and after J. S. dies without Iſſue, the Exchange is not defeated by this.

7. So if an Eſtate for Life be exchanged, and after one dies, yet the Exchange is not defeated by this; for this is determined according to the firſt Limitation.

8. So if Two exchange and after the Land which one hath is ſurrounded by the ſalt Sea, yet the Exchange is not defeated by this, for this comes by an Accident after the Exchange made.

9. If Two make an Exchange of Land, and after the one Releaſes to the other the Warranty created by the Law, yet this ſhall not defeat the Exchange. 16 E. 3. Eſchange 2. per Hill.

10. In every Exchange rightly made, the Word *Excambium* imports a Condition and alſo a Warranty, the one to give an Entry and the other a Voucher and Recompence in regard of the reciprocal Conſideration. 4 *Co.* 121. *a.* reſolved.

11. Tho' the Party hath Notice that Part of the Lands by him taken in Exchange, was ſubject to a prior Title, yet upon an Eviction thereof he may enter upon his own Land and defeat the Exchange. 4 *Co.* 123. *a.* reſolved.

12. Such Exchange is to be avoided by the Parties thereto, and their Heirs. 4 *Co.* 121. *b.*

13. If *A.* exchanges Lands with *B.* who after aliens to *C.* and *C.* is evicted by Title Paramount, yet *C.* ſhall not enter upon the other. 4 *Co.* 121. *a. b.*

14. But if *A.* who had not aliened, had been evicted by ſuch Title Paramount, he might have entered, and avoided the Exchange. *Buſtard's* Caſe, 4 *Co.* 121. *b.*

(A) (a) (b) Eſcheat.

(a) The Derivation and Signification of the Word. Co. Lit. 13. a. 92. b.

In what (c) Caſes it ſhall be.

Fol. 816.

1. IF Two hundred Faggots are granted to a Maſter and his Co-brethren and their Succeſſors, to perceive from all the Lands of the Grantor, and after the Maſter and Co-brethren grant them over, and after their Corporation is diſſolved; yet the Thing granted to them ſhall not eſcheat to the Grantor, altho' it ought to have eſcheated if they had not granted it over. Mich. 34 El. B. R. Between (d) Southwell and Wade, adjudged; which Intratur Mich. 34 El. Rot. 229.

(b) In a Writ of Eſcheat, the Lord ſhall not alledge the Taking the Eſplees, becauſe he does not claim the Land by Reaſon of any Seiſin thereof, but by Reaſon of his Seigniory. 4 Co. 11. a. Part 554, 555. (c) Where there is an Impediment to the Diſcent. Vid. my ſecond (d) Poph. 91, 92. S.C.

2. (e) The Law is the ſame where Land, Rent, or other Thing is granted to a Corporation and their Succeſſors, and after the Corporation grants it over, and after is diſſolved; for this is all one as when it is granted to a Man and his Heirs, and he grants it over, and after dies without Heirs, there it ſhall not eſcheat. Mich. 37 El. B. R. Between Southwell and Wade, per Curiam.

(e) Co. Lit. 13. b. S. P.

3. But if (f) Land, (g) Rent, or other Thing be granted to a Corporation aggregate in Fee, and after the Corporation is diſſolved, the Thing granted to them ſhall eſcheat to the Donor.

(f) Co. Lit. 13. b. S. P. Winch 38. Godb. 211.

4. The Law is the ſame of a ſole Corporation.

(g) Godb. 211.

5. If a Man grants a Rent to another and his Heirs, and he dies without Heirs, it ſhall eſcheat to the Grantor, and ſhall be extinct in the Land.

6. If a Man grants an Advowſon in groſs to another in Fee, and the Grantee dies without Heirs, it ſeems this ſhall revert to the Grantor, not being held of any Body, for this is a groſs Thing which cannot vaniſh, but ought to be in ſome Perſon; and it ſeems if the Grantor ſhall not have it, the King ſhall have it as ſupream Patron. Contra Sta. Eſcheat, it ſhall be extinct.

7. (h) An Eſcheat may be either *per defectum Sanguinis*, or *per* (i) (k) *delictum tenentis*. *Co. Lit.* 13. *a.* 92. *b.*

(h) Godb. 211. S.P. per Coke.

(i) In Caſe of an Attainder of Felony, the Eſcheat to the Lord is pro defectu tenentis, and the not deſcending the Conſequence of the Corruption of the Blood; but in Caſe of Treaſon, the Lands come to the Crown as an immediate Forfeiture, and not as an Eſcheat. Salk. 85. (k) But if pardoned before Attainder, there can be no Eſcheat. Ow. 87.

8. If Lands held of the King, as of an Honour, come to him by a common Eſcheat, as the Tenant's dying without Heir, or committing Felony, (l) theſe Lands are Part of the Honour. 2 *Inſt.* 64.

(l) 4 Inſt. 224. and vid. Kelw. 104. b. 2 Rol. Rep. 251.

9. Otherways if forfeited for Treaſon, for then it comes to the King by Reaſon of his Perſon and Crown; and if he grants them over, *&c.* the Patentee ſhall hold of the King in chief, and not of the Honour. 2 *Inſt.* 64.

10. If one ſeiſed in Fee of a Fair, Market, Common, Rent-Charge or Seck, Warren, Corrody, or other Inheritance not holden, is attainted of

of Felony, the King ſhall have the Profits of them during his Life; but after his Death they cannot deſcend, becauſe his Blood is corrupted, nor eſcheat, becauſe not holden, but periſh and are extinct by Act in Law. 3 *Inſt.* 21.

(B) In (a) what Caſes there ſhall be an Eſcheat.

(a) A Right of Action conſiſts only in Privity, and cannot eſcheat. 3 Co. 2. b.

Where the Lord hath a Tenant that is in by Title, and where not.

(b) 3 Co. 35. 1. S. P.

1. (b) **If the Tenant be diſſeiſed, and the Diſſeiſee dies without Heir, during the Continuance of the Diſſeiſor, this Right ſhall eſcheat to the Lord.** 3 R. 2. Entry Congeable 38.

2. **If the Tenant be diſſeiſed, and the Diſſeiſor by Fine grants and renders the Land to one in Tail, the Remainder to another in Fee, and after the Tenant in Tail dies without Iſſue, and he in Remainder enters, and after the Diſſeiſee dies without Heir, this Right ſhall not eſcheat to the Lord, becauſe he had another Tenant by Title in the Life of the Diſſeiſee.** 3 R. 2. Entry Congeable 38. **adjudged.**

(c) Hob. 142.

3. If a Diſſeiſor makes a Feoffment, or (c) dies ſeiſed, and after the Diſſeiſee dies without Heir, there ſhall be no Eſcheat, becauſe the Lord hath a Tenant by Title. *Co. Lit.* 268. *b.*

4. Tho' a Lord hath not been ſeiſed of his Services within the Time of Limitation, yet if the Tenant dies without Heir, the Land ſhall eſcheat; for at the Time of the Eſcheat, the Seigniory remained, tho' Seiſin of the Services was wanting. 4 *Co.* 11. *a.*

5. If an Infant, or *Non Compos*, in Perſon make a Feoffment, and after die without Heir, the Land ſhall not eſcheat. 4 *Co.* 125. *a.*

6. Otherwiſe if made by Letter of Attorney, for then the Feoffment is void. 4 *Co.* 125. *a.*

Who ſhall take Benefit thereof.

(d) After the Death of the Tenant for Life, the Leſſor may have a Writ of Eſcheat, and the Words of the Writ are true, viz. that the Tenant that died, &c. held the Lands of him. Kelw. 114. a. —— The Tenancy comes in Lieu of the Seigniory. 1 Co. 122. a.

IF one leaſe a Manor for Life or Years, and a Tenancy eſcheats, (d) this belongs to the Manor held in Farm, and for which the Leſſor ſhall have a general Writ; and ſuppoſe a Leaſe by him made of the Lands eſcheated, and maintain it by the Special Matter. 2 *Inſt.* 146.

By what Act an Eſcheat ſhall be prevented.

1. IF he that hath Title to a Writ of Eſcheat accepts Homage or Fealty of the Tenant, this will bar him. *Co. Lit.* 268. *a.*

2. Otherwiſe if he accepts Rent of the Tenant, for that may be done by a Bailiff. *Co. Lit.* 268. *a.*

3. By ſome, if there be Lord and Tenant, and the Tenant is diſſeiſed, and the Diſſeiſee dies without Heir, and after the Lord accepts the Rent from the Diſſeiſor, this is no Bar to him. *Co. Lit.* 268. *a.*

4. Otherwiſe if he avows upon the Diſſeiſor for the Rent. *Co. Lit.* 268. *a.*

5. But if after a Title of Eſcheat accrued, the Diſſeiſor makes a Feoffment, or dies ſeiſed, the Acceptance of the Rent from the Feoffee, or Heir, will be a Bar. *Co. Lit.* 268. *a.*

6. If one attainted of Felony commits Treaſon afterwards, and is thereof attainted, as he may be, becauſe the Offence is of an higher Nature than the Felony; yet this ſhall not deveſt the Right of Eſcheat which by the Felony was lawfully veſted in the Lord, contrary to the Opinion of *Stanford*, for the Act of the Party ſhall not deveſt the lawful Eſcheat of the Lord. 3 *Inſt.* 213.

7. (a) If *A.* as Principal, is attainted of Felony by Outlawry, and *B.* is after attainted as acceſſory by Verdict, and the Lord enters into the Lands of *B.* by Eſcheat, and after the Judgment againſt *A.* is reverſed, by which the Attainder of *B.* is alſo reverſed; the Eſcheat is avoided, and *B.* may enter or have an Action for Recovery of the Lands againſt the Lord. 3 *Inſt.* 232.

(a) 2 Brownl. 220. S. P. cited, 9 Co. 119. b.

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(a) 2 Brownl. 220. S. P. cited, 9 Co. 119. b.

Eſcheator.

(a) By 14 Ed. 3. c. 8. to be choſe by the Chancellor, &c. as Sheriffs.

1. HE is an antient Officer named (a) by the Lord Treaſurer, and called ſo, becauſe his Office is properly to (b) look to Eſcheats, Wardſhips, and other Caſualties belonging to the Crown. *Co. Lit.* 13. *b.*

—— By 12 Ed. 4. c. 9. muſt have a Freehold in the ſame County, worth 20 l. per Annum. —— By 1 Hen. 8. c. 8. muſt have forty Marks yearly. —— By 14 Ed. 3. c. 8. are to continue in Office but for one Year. (b) To inquire of caſual Profits, and ſeiſe them into the King's Hands, that they may be anſwered to him. Co. Lit. 92. b.

2. There was antiently but two Eſcheators, one on this Side *Trent*, and the other beyond *Trent*, but they had Sub-Eſcheators. *Co. Lit.* 13. *b.*

(c) Viz. One in every County.

3. By the Statute 14 *Edw.* 3. *cap.* 8. it is enacted, there ſhall be (c) as many Eſcheators as when King *Edward* came to the Crown.

(a) (b) Eſſoign.

Diſallow.

(a) Vide Title Protection.

Fol. 817.

(b) The Derivation of the Word, and that in legal Underſtanding it is an Excuſe of a Default by Reaſon of ſome Impediment, and is as well for the Plaintiff as Defendant, and is all one with what the Civilians call Excuſatio. 2 Inſt. 125. Lutw. 862.

(c) Vide Statute of Eſſoigns, 12 Ed. 2.

(A) (c) For what Cauſes it may be diſallowed.

1. If an Eſſoign be adjudged for the Attorney, if he be after ſeen in Court, and before Adjournment, yet it ſhall be allowed. (d) 7 H. 4. 39.

(d) Fitz. 134. S. C. Br. 36. S. C.

2. If an Eſſoign be caſt by the Party for Part of the Land in Demand, if he appears after the ſame Day upon the ſame Original for the other Part, the Eſſoign ſhall be diſallowed; (e) for he cannot be eſſoigned and appear at the ſame Day upon the ſame Writ, for the Original is intire. (f) 11 H. 4. 82.

(e) Where the Entry of the Appearance of the Parties in Court, at the Day when the Eſſoign was caſt, confounds the Eſſoign without any Challenge or Exception. Dyer 224. pl. 27. 324. pl. 36. and vid. Hut. 69.

(f) Br. Default and Appearance 84. S. C. Fitz. Eſſoign 136. S. C.

3. If an Eſſoign de malo veniendi be caſt, and the Party for whom it is caſt (g) appears in Court before it is adjudged and adjourned, this ſhall be diſallowed. (h) 12 H. 4. 24. b.

(g) By the Statute of Eſſoigns, 12 Ed. 2. it lies not where the Party was ſeen in Court. —— An Eſſoign caſt after Appearance is abſurd. Carth. 173.

(h) Br. Eſſoign 45. S. C.

4. If an Eſſoign be caſt for Baron and Feme, and the Baron is ſeen in Court before it is adjudged, it ſhall be quaſh'd. (i) 11 H. 6. 53.

(i) Br. Eſſoign 122. S. C. Fitz. 99. S. C.

5. If an Eſſoign be caſt for Baron and Feme, and adjudged and adjourned; yet if it after appears that the Baron appeared at the Day of the Eſſoign caſt, it ſhall be diſallowed; for the ſame Day that he appeared in proper Perſon he could not be eſſoigned, and the Allowance was the Default of the Court. (k) 4 H. 6. 6. b.

(k) Br. Eſſoign 73. S. C. Fitz. 91. S. C.

6. If the Plaintiff's Attorney be eſſoigned the firſt Day of the Return, and the third Day after, before the Eſſoign adjourned, the Attorney is removed, the Eſſoign ſhall be quaſhed. (l) 22 E. 3. 4. b.

(l) Fitz. Eſſoign 32. S. C.

7. By the Statute of *Weſtm.* 1. made 1 *Ed.* 3. *cap.* 43. the Eſſoign (m) *ultra Mare* ſhall not be allowed, if the Demandant will challenge it, and aver that he was in *England* the Day of the Summons, and three Weeks (n) after, but adjourned in this Form, that if the Demandant be

(m) It does not extend to an Eſſoign de ſervitio Regis. 2 Inſt. 252. —— But in ſuch Caſe, where the Party is not in the King's Service, the Demandant or Plaintiff may ſue a ſpecial Writ out of Chancery, directed to the Juſtices, rehearſing that he is not in the King's Service, and commanding them to proceed, and then the Eſſoign ſhall not be adjourned, but quaſhed preſently. 2 Inſt. 253. —— And ſo before this Act they might have done upon an Eſſoign de ultra mare, but many Times ſuch Writ could not be got without great Difficulty. 2 Inſt. 253.

(n) The Day of the Summons muſt be taken exclusive, otherways if the Words had been three Weeks after the Summons made. 2 Inſt. 253.

ready

ready at a Day certain, by Averment of the Country, or otherways, as the Court ſhall award, to prove that the Tenant was within the four (a) Seas the Day he was ſummoned, and three Weeks after, the Eſſoign ſhall be turned into a Default, and that only before Juſtices.

(a) That is as much as to ſay within the Juriſdiction of the King of England. 2 Inſt. 253.

8. By the Statute of *Weſtm.* 2. made the 13 *Ed.* 3. In the (b) Circuit of the (c) Juſtices, an Eſſoign *de malo lecti* ſhall not be allowed for Lands in the ſame County, (d) unleſs the Party be ſick indeed; for if the Demandant except, that the Tenant is not ſick, his Exception ſhall be admitted; and if it can be ſo proved by Inqueſt, the Eſſoign ſhall be turned to a Default.

(b) So it is in the printed Acts, but the Original being in Latin, 'tis In Itinere Juſtic', &c. vid. 2 Inſt. 393.

(c) The Juſtices in Eyre only mentioned, yet by Equity it extends to Common Pleas. 2 Inſt. 393.

(d) Before this Act, the adverſe Party could not ſay he was in Health, and not ſick, and try it by Jury, but it was inquired by four Knights, returned for that Purpoſe by the Sheriff; and if they found he was not, he ſhould have fifteen Days after to appear. 2 Inſt. 393.

At what Time.

1. If there be two Attornies in one Plea, and one only is eſſoigned, where both ought to be, and this is adjudged and adjourned, and no Challenge thereto, at this Time, he ſhall not have a Challenge after to this. (e) 11 H. 4. 54. (f) 12 H. 4. 25. b. (g) 18 H. 6. 20.

(e) Br. Eſſoign 38. S. C. Fitz. 174. S. C.

(f) Br. Eſſoign 43. S. C. Fitz. 174. S. C.

(g) Fitz. Eſſoign 101. S. C.

(B) In what Caſes a Diſallowance againſt one ſhall be againſt another.

1. If an Eſſoign be caſt for Baron and Feme, if the Eſſoign be caſt ſeverally for each of them, and this is diſallowed for the Baron, yet it ſhall remain for the Feme. (h) 11 H. 6. 53.

2. But otherways it is if the Eſſoign be caſt jointly. (i) 11 H. 6. 53.

(h) Fitz. Eſſoign 99. S. C.

(i) Fitz. Eſſoign 99. S. C.

(C) What Perſons may be eſſoigned.

What.

1. A common Eſſoign is de malo veniendi. (k) 21 E. 4. 79.

(k) Br. Eſſoign 114. S. C. 2 Inſt. 125. S. P.

How many Sorts.

2. There are (l) four manner of Eſſoigns, viz. de malo veniendi, (m) de malo lecti, de ſervitio Domini Regis (n) ultra mare & (o) protectio. (p) 21 E. 4. 79. b.

(l) That there are five Sorts, vid. 2 Inſt. 125.

(m) For this vid. 2 Inſt. 393.

(n) For this vide 2 Inſt. 251, 252.

(o) For this vid. 2 Roll. Abr. 320, &c.

(p) Br. Eſſoign 114. S. C.

(D) What Perſons ſhall have One.

Fol. 818.

1. (a) A Coꝛpoꝛation aggregate, as Mayoꝛ and Commonalty, Dean and Chapter, cannot have an Eſſoign de malo veniendi, noꝛ malo lecti, becauſe theſe are to excuſe the coming in pꝛoper Perſon; but theſe Coꝛpoꝛations cannot come in pꝛoper Perſon, noꝛ can be ſick; ergo. (b) 21 E. 4. 79. Curia.

(a) N. Bendl. 121. pl. 154. S.P. adjudged. (b) Br. Eſſoign 114. S. C.

2. A Coꝛpoꝛation aggregate ſhall not have an Eſſoign de ſervitio Domini Regis ultra mare. (c) 21 E. 4. 79. b.

(c) Br. Eſſoign 114. S. C.

3. If a Man tenders his Law by Attoꝛney, at the Day he ſhould do his Law, his Attoꝛney ſhall not be eſſoigned, becauſe he ought to appear in Perſon, and not by Attoꝛney. 21 E. 4. 79. b. (d) 7 H. 4. 6. foꝛ by the Wager of Law the Attoꝛney is out of Court. (e) 4 H. 6. 11.

(d) Br. Eſſoign 35. S. C. Fitz. 135. S. C.

(e) Br. Eſſoign 75. S. C. Fitz. 93. S. C.

4. But in this Caſe the Tenant himſelf may be eſſoigned. (f) 4 H. 6. 11.

(f) Br. Eſſoign 75. S. C. Fitz. 93. S. C.

5. (g) If a Man hath an (h) Attoꝛney in the Plea, he himſelf cannot be eſſoigned. (i) 45 E. 3. 10. b. Foꝛ that although he cannot come, yet the Attoꝛney may. 12 H. 4. 25. b. 1 E. 3. 2.

(g) When the Appearance of the Attorney is recorded, the Tenant cannot at the ſame Time be eſſoigned. Cro. Car. 511. Lutw. 854. (h) By the Statute of Eſſoigns, 12 Ed. 2. it lies not where a Man's Attorney was eſſoigned. (i) Fitz. Eſſoign 155. S. C.

6. As in a Quare Impedit, the Plaintiff (k) cannot be eſſoigned, and his Attoꝛney not eſſoigned alſo. (l) 14 H. 4. 12. b.

(k) Where caſt for both, and held Surplusage as to one. Hob. 47. (l) Br. Eſſoign 46. S. C.

7. (m) A Man that hath an Attoꝛney in the Plea cannot be eſſoigned, the Attoꝛney not being eſſoigned alſo. (n) 19 H. 6. 51. (o) 57. (p) 21 E. 3. 45. b. 61. b. 21 Aſſ. placito 17. adjudged.

(m) Cro. Car. 511. S. P. (n) Br. Eſſoign 64. S. C. Fitz. 103. S. C. (o) Br. Eſſoign 66. S. C. (p) Br. Eſſoign 60. S. C.

8. A Man cannot be eſſoigned of an Eſſoign ultra Mare, where he hath an Attoꝛney in the Plea not eſſoigned. 19 H. 6 61. b.

Any Eſſoign.

9. So it is of an Eſſoign ad terram Sanctam. 19 H 6. 61. b.

10. So it is of an Eſſoign de ſervitio Regis. 19 H. 6. 61. b.

11. But a Man may be eſſoigned de malo lecti, where he hath an Attoꝛney in the Plea not eſſoigned, becauſe this Eſſoign lies only in a Writ of Right, where none can join the Miſe upon the mere Right, but the Maſter. 19 H. 6. 61. b.

12. In an Action bꝛought by Baron and Feme, the Wife cannot be eſſoigned if the Husband makes Default, foꝛ the Default of the Husband is the Default of the Wife. 11 H. 6. 23. b.

13. But the Wife may be eſſoigned if the Husband appears. 11 H. 6. 23. b.

14. If there be a Variance between the Warrant of Eſſoin and Writ, it ſhall be quaſhed. (q) 18 E. 4. 4. b.

(q) Br. Eſſoign 112. S. C.

15. If Aid be granted of Baron and Feme, and at the Day the Baron is eſſoigned de ſervitio Regis, and at the Day he hath by the

Eſſoign, does not bring his Warrant, by which there is a Default in him, yet the Wife may be eſſoigned, though ſhe could not be received. (a) 21 E. 3. 13. adjudged.

(a) Br. Eſſoign 53. S. C. Fitz. 8. S. C.

Eſſoign of the King's Service.

16. A Woman may be eſſoigned of the King's Service. (b) 17 E. 3. 3. admitted.

(b) Fitz. Eſſoign 1. S. C.

17. (c) A Woman may be eſſoigned of the King's Service, (d) quia nutrix to the King's Child. (e) 19 H. 6. 51. b.

(c) 1 Roll. Abr. 820. I. 1. S. P.

(d) But yet the Words of the Statute of Eſſoigns, 12 Ed. 2. are general, viz. that an Eſſoign de ſervitio Regis lies not where the Party is a Woman. (e) Br. Eſſoign 64. S. C. Fitz. 103. S. C.

18. So ſhe may be eſſoigned quia lotrix of the King. (f) 19 H. 6. 51. b.

(f) Br. Eſſoign 64. S. C. Fitz. 103. S. C.

19. A Man may be eſſoigned of the King's Service, because he is his Carver. (g) 19 H. 6. 51. b.

(g) Fitz. Eſſoign 103. S. C.

Fol. 819.

(E) What Perſon may be eſſoigned.

1. IN Annuity againſt a Parſon, after Aid granted and the Payees are eſſoigned, at another Day the Attorney of the Defendant may be eſſoigned. (h) 2 H. 4. 4.

(h) Br. Eſſoign 31. S. C. Fitz. 131. S. C.

2. The Attorney may be eſſoigned (i) of the King's Service as well as by a common Eſſoign, for the King may command him to go in his Service. (k) 19 H. 6. 51.

(i) An Eſſoign de malo lecti lies not for the Attorney, for no Eſſoign ſhall be caſt for him, but the common Eſſoign. 2 Inſt. 394. (k) Br. Eſſoign 64. S. C.

3. The Attorney of the Tenant may be eſſoigned without the Tenant himſelf. (l) 12 H. 4. 26.

(l) Br. Eſſoign 38, 43. S. C. Fitz. 174. S. C.

4. If a Man hath two Attornies in one Plea, both ought to be eſſoigned, and not one alone. (m) 11 H. 4. 54.

(m) Fitz. Eſſoign 174. S. C. Br. 38, 43. S. C.

5. This is true, where the Attornies are made jointly, for there one has not Power without the other. (n) 12 H. 4. 26. 18 H. 6. 20.

(n) Fitz. Eſſoign 174. S. C. Br. 38, 43. S. C.

6. But if the Warrant be in the Disjunctive, ſcilicet talem vel talem, the one may be eſſoigned without the other, and it ſhall be good. 12 H. 4. 26. Dubitatur contra. (o) 18 H. 6. 20.

(o) Fitz. Eſſoign 101. S. C.

7. If the Attorney Wages his Law, and hath Day for his Maſter to perform it; at this Day the Attorney cannot be eſſoigned, becauſe the Maſter ought to do his Law in Perſon, and the Day is given to him, and ſo the Attorney out of Court. (p) 19 H. 6. 30. b.

(p) Br. Eſſoign 63. S. C.

8. The Husband and Wife may have ſeveral Eſſoigns. Between Lady *Raynor* and *Holcroft* and his Wife. *Noy* 144. reſolved.

(F) Who may be eſſoigned, and at what Time.

1. THE Tenant may be eſſoigned after the Vouchee is eſſoigned, (a) before the Vouchee hath entered into Warranty; for before that the Tenant is Party to the Action. (b) 45 E. 3. 24. b.

(a) 1 Roll. Abr. 825. pl. 25. Vide.

(b) Br. Eſſoign 28. S. C. Fitz. 67. S. C.

2. If B. be vouched, and upon a Summons ad Warrantizandum he is eſſoigned of a common Eſſoign, and after of an Eſſoign de ſervitio Regis, and at the Day which he hath by the Eſſoign he does not bring his Warrant; yet at the ſame Day the Tenant may be eſſoigned, for none is Party but the Tenant himſelf, till the Vouchee hath entered into Warranty. (c) 23 Aſſ. 15. adjudged.

(c) Br. Eſſoign 95. S.C.

3. At the Sequatur ſub ſuo periculo againſt the Vouchee, if the Writ be not returned, the Tenant may be eſſoigned. (d) 11 H. 4. 72. b.

(d) Br. Eſſoign 39. S.C.

4. If the Vouchee appears at the Sequatur ſub ſuo periculo returned, and demands the Lien, and the Tenant ſhews a Deed, and the Vouchee denies it, at the Venire facias returned the Tenant may be eſſoigned. 11 H. 4. 82. (e) but Quære.

(e) 1 Rol. Abr. 825. pl. 25. vid.

5. If upon the Default of the Tenant, he in Reverſion be received, and after Iſſue the Parol is diſcontinued by the Death of the King, and a Reſummons is ſued only againſt the Tenant, by Reſceit he may be eſſoigned. 1 E. 3. 7. adjudged.

(G) Who may be eſſoigned for a collateral Reſpect.

Not a Man in Priſon.

1. IF a Man in Debt be attached by his Body, and finds Mainprize, yet at the Day of the Return he may be eſſoigned of an Eſſoign quia profecturus, for ſuch Protection hath at all Times been allowed in ſuch Caſe, though he remains in Ward. (f) 28 E. 3. 94. b. adjudged.

(f) Fitz. Protection 92. S. C.

2. If a Man be upon (g) Mainprize, he cannot be eſſoigned in the King's Service, or other Eſſoign, for he is in a Manner in Priſon. (h) 9 H. 6. 58.

(g) Where he that comes in upon an Exigent or Cepi 2 Inſt. 417.

Corpus cannot be eſſoigned, for that he either remaineth in Ward, or goeth by Mainprize. (h) Br. Eſſoign 4. S. C.

3. But if a Protection be caſt for a Man that is let to mainprize, * by which the Parol is put without Day, and after a Reſummons is ſued, he may now be eſſoigned de ſervitio Regis, notwithſtanding he was by Mainprize before. 22 E. 3. 10. b. adjudged.

* Fol. 820.

4. In Debt, if the Defendant appears by Cepi Corpus, and at the Day the Plaintiff is eſſoigned, the Defendant ſhall have a Day by the Eſſoign alſo without Mainprize. (i) 19 H. 6. 80. Becauſe the Plaintiff hath waived his Benefit by the Eſſoign.

(i) Br. Eſſoign 67. S.C.

5. If

(a) Br. Eſſoign 121. S. C. Fitz. 98. S.C.

5. If the Plaintiff in Replevin imparls till another Day of the ſame Term, at this Day he cannot be eſſoigned, becauſe this Day and the firſt Day are but one Day in Law. (a) 11 H. 6. 31. b.

(b) Br. Eſſoign 121. S. C. Fitz. 98. S. C.

6. The ſame Law ſhould be if he had imparled to another Term, he could not be eſſoigned at the Day. (b) 11 H. 6. 31. adjudged.

(c) Fitz. Eſſoign 98. S.C.

7. The ſame Law ſhould be if the Defendant had imparled to another Term, no Eſſoign would lie for him at the Day. (c) 11 H. 6. 31.

8. If in Replevin a Day is given to the Parties till another Term, they may be eſſoigned at the Day, for this is the Act of the Court. 11 H. 6. 31 b.

(d) Statute of Eſſoigns 12 Ed. 2. ſo enacted.

9. (d) An Eſſoign does not lie for him that is ſeen in Court. (e) 11 H. 6. 53.

(e) Br. Eſſoign 122. S. C. Fitz. 99. S. C.

(f) Br. Eſſoign 56. S. C.

10. In a Writ by ſeveral Precipes againſt Three, the Plaintiff cannot be eſſoigned againſt one, and appear in Perſon to the others, for it appears that his Eſſoign is falſe. (f) 21 E. 3. 36. b. adjudged.

(g) Br. Eſſoign 56. S. C.

11. Nor in this Caſe can he be eſſoigned againſt one, and appear by Attorney againſt the others, for he might as well make an Attorney for all as for them. (g) 21 E. 3. 36. b. quære.

(h) Br. Eſſoign 122. S. C. Fitz. 99. S.C.

12. In an Action againſt Baron and Feme, the Wife may be eſſoigned, tho' the Husband makes Default. (h) 11 H. 6. 53. 30 E. 3. 19. b. contra 11 H. 6. 23. becauſe the Default of the Husband is the Default of the Wife.

(i) Br. Eſſoign 122. S. C. Fitz. 99. S.C.

13. So if the Husband appears, the Wife may be eſſoigned. (i) 11 H. 6. 23. b.

(k) Fitz. Eſſoign 9. S. C. (l) Br. Eſſoign 93. S. C.

14. If in an Aſſiſe returned, the Plaintiff hath not found Pledges, yet he may be eſſoigned, for he may be demanded and nonſuited, and notwithſtanding the Writ is not well ſerved, yet it is ſerved in a Manner. (k) 21 E. 3. 54. b. adjudged. (l) 21 Aſſ. pl. 11. contra (m) 29 Aſſ. 46. per Thorpe.

(m) Br. Eſſoign 97. S. C.

(n) Br. Eſſoign 92. S. C. Fitz. 65. S.C.

15. If an Original be returned tarde, yet the Plaintiff may be eſſoigned. (n) 19 Aſſ. 12.

(H) Againſt whom it lies.

(o) Br. Eſſoign 33. S. C. Fitz. 133. S. C.

1. IN a Quare Impedit by the King, the Defendant may be eſſoigned. (o) 3 H. 4. 15. b. (p) 7 H. 4. 39. b. 20 E. 3. Eſſoign 24.

(p) Br. Eſſoign 36. S. C. Fitz. 134. S. C.

2. In a Writ of Right by the King, a common Eſſoign and an Eſſoign de ſervitio Regis lies for the Tenant. Dubitatur Kelleway incerti temporis 135. 119.

(I) For what Cauſes it lies.

1. (i) A Woman may be eſſoigned de ſervitio Regis quia nutrix Dominæ Iſabellæ filiæ Domini Regis. (b) 28 E. 96. b.

(a) 1 Rol. Abr. 818. pl. 17. S. P.

(b) Fitz. Eſſoign 40. S. C.

(K) At what Time it may be.

1. IN an Aſſiſe, if the Parties demur, and thereupon they are adjourned for Difficulty, and the Aſſiſe is awarded, and a Reſummons awarded at the Return thereof in Pais, the Tenant cannot be eſſoigned. (c) 30 Aſſ. 51. adjudged, becauſe it is but mean Proceſs.

(c) Br. Eſſoign 98. S. C.

2. (d) But if an Aſſiſe be diſcontinued by the not coming of the Juſtices, upon which * a Reſummons is ſued; at the Return thereof the Tenant may be eſſoigned, for this revives the Original, and is of the Nature of the Original. (e) 30 Aſſ. 51. adjudged.

(d) 2 Inſt. 249. S. P.

* Fol. 821.

(e) Br. Eſſoign 98. S. C.

(L) By whom it may be caſt.

Common Eſſoign.

1. (f) IT is not material, whether there be any ſuch one in rerum Natura, who caſts the common Eſſoign. (g) 12 H. 4. 15.

(f) If caſt by a Stranger, the Tenant may come and diſavow it, and aver Quod nunquam fecit ſe eſſoniari. Lutw. 865. a.

(g) Br. Eſſoign 42. S. C.

2. For the Name of him that caſts it ſhall not be entered. 27 E. 3. 82. b.

The King's Service.

3. There ought to be ſuch Perſon in rerum Natura who caſts this Eſſoign, otherways it is not good, becauſe he ought to avow it in proper Perſon. (h) 12 H. 4. 24. b. 27 E. 3. 82. b.

(h) Br. Eſſoign 44. S. C. Fitz. 139. S. C.

4. For the Name of him who caſts the Eſſoign ought to be entered. 27 E. 3. 82. b.

5. This Eſſoign may be caſt by one that is within Age. 21 E. 3. 33. b.

(M) How it is to be caſt.

Common Eſſoign.

1. AN Eſſoign cannot be caſt by the Party in Perſon. (i) 4 H. 6. 6. b. 8.

(i) Br. Eſſoign 74. S. C. Fitz. 91. S. C.

—— That an Eſſoign caſt after Appearance is abſurd. Carth. 173. Ante A. pl. 3.

2. He that is mainpriſed cannot caſt an Eſſoign de ſervitio Regis for himſelf, for he that is by Mainprize the Law adjudges always in Priſon. (a) 4 H. 6. 8.

(a) Br. 74. S.C.

(b) He muſt appear in Perſon and be ſworn. 2 Inſt. 314.

Eſſoign de Service.

3. He that caſts this Eſſoign ought to (b) avow it in proper Perſon. 12 H. 4. 15.

Eſſoin de malo lecti.

4. In this Caſe there ſhall be two Eſſoigners, and one ſhall caſt the Eſſoign, and the other ſwear he ſaw the Party ſick. 2 *Inſt.* 393.

(N) In what Caſes he ought to ſwear the Eſſoign.

1. IF one caſts an Eſſoign de ſervitio Regis, he ought to ſwear the Eſſoign true. 19 H. 6. 51. b. 20 H. 6. 20. b.

(O) What ſhall be a good (e) Swearing.

(e) In the Original it is jurate.

1. IT is not ſufficient for him that caſts an Eſſoign de ſervitio Regis to ſay, that he is informed that his Maſter is in the King's Service, unleſs he ſays expreſly that he is in the King's Service. (f) 20 H. 6. 20. b.

(f) Br. Eſſoign 5. S. C.

(P) (g) How it ought to be entered.

(g) How the Proceedings ſhall be thereupon, vid. Lutw. 862. a. b.

In reſpect of the Thing.

1. IF the Tenant be eſſoigned (h) in a Præcipe quod reddat of a Rent, it ſhall be entered in placito terræ, and not de placito annui redditus. (i) 11 H. 4. 43. b.

(h) So in a Quare Impedit. Hob. 304.

(i) Br. Eſſoign 37. S. C.

Fol. 822.

In Reſpect of the Action.

2. In a Writ of Diſceit, if the Eſſoign be entered in placito Deceptionis, it is not good. (k) 14 H. 4. 18.

(k) Br. Eſſoign 47. S. C. Fitz. 142. S. C.

3. But if it be entered in placito Deceptionis & Tranſgreſſionis, this is good. (l) 14 H. 4. 18. b.

(l) Br. Eſſoign 47. S. C. Fitz. 142. S. C.

4. So if it be in placito Tranſgreſſionis only, it is good. (m) 14 H. 4. 18. b.

(m) Fitz. 142. S. C.

5. In a Writ de rationabili parte bonorum, an Eſſoign caſt by the Defendant ſhall be entered in placito Debiti, for it is a Debt. 17 E. 3. 17. b.

6. In a Writ of Annuity, if the Defendant be eſſoigned, it ſhall be entered in placito Debiti. 17 E. 3. 17. b.

7. In a Recordari, the Eſſoign de ſervitio Regis for the Defendant ſhall be entered in placito detentionis averiorum, and not de placito Captionis & Detentionis, &c. 27 E. 3. 82. b.

(Q) In (a) what Actions and Suits an Eſſoign may be.

(a) My Lord **Coke**, in his 2 Inſt. 125. ſays, I find not in **Glanvill** any Eſſoigns, but in Real Actions, but before the making the Statute of **Marlbridge**, Eſſoigns were intended of an

Common Eſſoign.

1. Co. 9. (b) Anne Bedingfield 15. b. **adjudged, that a common Eſſoign lies in a Writ of Dower; and the Statute** 12 E. 2. Magna Charta 109. b. **is to be intended of** (c) **Eſſoigns** de ſervitio Regis.

allowed in Perſonal Actions. (b) Noy 144. S. P. adjudged, and that the Statute is to be Eſſoign of the Service of the King, or of an Eſſoign after Iſſue; for which laſt vid. Hut. 69. (c) This Eſſoign by the Common Law does not lie in a Writ of Dower. 2 Inſt. 124.

2. **No Eſſoign lies in** (d) **judicial Writs.** (e) 33 H. 6. 5. b. **adjudged, that it does not lie** in quem redditum reddit.

(d) Kelw. 71. b.
(e) Br. Eſſoign 8. S. C. Fitz. 110. S. C.

3. **It does not lie in a** (f) Scire facias. 33 H. 6. 5. b. per Pri. **not in a** Scire facias **to execute a Judgment.** (g) 39 H. 6. 50.

(f) 2 Inſt. 126.
(g) Br. Eſſoign 135. S. C.

4. **It does not lie in a** Venire facias. (h) 33 H. 6. 5. b. per Comberford.

(h) Br. Eſſoign 8. S. C. Fitz. 110. S. C.

5. **In Treſpaſs, after a Protection allowed for the Defendant and repealed, and the Plaintiff hath a Re-attachment, Attorney for the Defendant may be eſſoigned.** (i) 34 H. 6. 4. per Curiam.

(i) Br. Eſſoign 11. S. C. Fitz. 112. S. C.

6. **The ſame Law in a Reſummons in a Plea of Land.** (k) 34 H. 6. 4. per Curiam.

(k) Br. Eſſoign 11. S. C. Fitz. 112. S. C.

7. **No Eſſoign lies in any Attaint where it does not lie in the firſt Writ, as upon an Appeal of Mayhem.** (l) 34 H. 6. 36.

(l) Br. Eſſoign 15. S. C.

8. (m) **The Defendant** (n) **cannot be eſſoigned in a** Quare Impedit. (o) 22 E. 3. 4. b. contra (p) 22 E. 3. 7. b.

(m) Kelw. 135. b. S. P. per Grantham. (n) An Eſſoign de ſervitio Regis ad terram Sanctam, or ultra Mare, lies not in a Quare Impedit or Darrein Preſentment, for doubt of the Lapſe. 2 Inſt. 125. (o) Fitz. Eſſoign 33. S. C. (p) Fitz. Eſſoign 34. S. C.

9. **An** (q) **Eſſoign lies in a** Quare Impedit **for the Plaintiff.** 14 H. 4. 12. b. (r) 22 E. 3. 4. b.

(q) A common Eſſoign, but not an Eſſoign de ſervitio Regis, &c. 2 Inſt. 125. (r) Fitz. Eſſoign 33. S. C.

10. (s) **An Eſſoign does not lie in an Aſſiſe, becauſe Delays are ouſted in this.** (t) 14 H. 6. 22. b. (u) 22 Aſſ. 79.

(s) 2 Inſt. 249. S. P. 411. S. P. 8 Co. 50. S. P.
(t) Br. Eſſoign 81. S. C. (u) Br. Aſſiſe 94. S. C.

11. **In a Writ of Entry in Nature of an Aſſiſe the Tenant may be eſſoigned.** (x) 14 H. 6. 22. b. **adjudged** contra 22 Aſſ. 79.

(x) Br. Eſſoign 81. S. C.

12. **An Eſſoign does not lie in a** quem redditum reddit. (y) 9 H. 6. 21. b.

(y) Br. Eſſoign 127. S. C.

13. **An Eſſoign does not lie by the Tenant in an Aſſiſe of** Mortdanceſter. (z) 22 Aſſ. 79.

(z) Br. Eſſoign 94. S. C.

14. **Nor by his Vouchee.** 22 Aſſ. 79.

15. **An Eſſoign does not lie for the Plaintiff in an Aſſiſe of** Novel Diſſeiſin. (aa) 22 Aſſ. 79. **nor in a** Mortdanceſtor. (bb) 22 Aſſ. 79.

(aa) Br. Eſſoign 94. S. C.
(bb) Br. Eſſoign 94. S. C.

16. **An**

16. An Eſſoign does not lie in a Scire facias. 19 H. 6. 31.

17. In an Aſſiſe by Two, if one makes Default, and the other ſues a Summons ad ſequendum ſimul at the Return thereof, he who made Default before cannot be eſſoigned. (a) 10 H. 6. 22.

(a) Br. Eſſoign 144. S. C. Fitz. 109. S C.

18. (b) An Eſſoign de malo lecti does not lie, but in a Writ of Right. 19 H. 6. 61. b.

Fol. 823.

(b) 2 Inſt. 394. S. P.

19. By the Statute of Weſtm. 2. cap. 17. an Eſſoign is taken away in a Writ of Right, between Two claiming by (c) one Diſcent.

(c) As Parceners by Common Law or Cuſtom, but if one Parcener claims the Land by Feoffment, and the other defend her in a Writ of Right, ſhe may be eſſoigned de malo lecti. 2 Inſt. 394.

De ſervitio Regis.

20. (d) It is not allowable in a (e) Quare Impedit, becauſe the Lapſe may incur in the mean Time. 14 H. 4 (f) 6. (g) 43 Aſſ. 21. per Thorpe.

(d) 2 Inſt. 124. S. P. Kelw. 135. b. S. P.

(e) Nor in an Aſſiſe of Darrein Preſentment. 2 Inſt. 124. Kelw. 135. b. S. P. (f) I ſuppoſe this is miſprinted, and ſhould be 12. which vid. Brook 46. (g) Br. Dilatories 10. S. C.

21. (h) This Eſſoign does not lie in an Aſſiſe of Novel Diſſeiſin. 5 E. 3. cap. 6, 7.

(h) 2 Inſt. 124. S. P. Kelw. 135. b. S. P.

22. This Eſſoign does not lie in an Attaint, for it is taken away by the Statute 5 E. 3. cap. 6. and 7. for the long Delay which may come thereby.

Any Eſſoign.

23. If a Man ſues a Scire facias out of a Fine, and pending this ſues a Writ of Eſtrepement, no Eſſoign lies in this Writ of Eſtrepement. 27 E. 3. 80. b.

24. An Eſſoign does not lie in a *Quare non admiſit*, becauſe it is in Nature of a judicial Writ founded on the Record in the *Quare Impedit*, tho' it iſſues out of Chancery, and becauſe it is an Accuſation of a Contempt to which the Defendant ought to anſwer. *Mich.* 21 *H.* 7. *Kelw.* 71. *b.* the Eſſoign quaſhed for theſe Reaſons.

(i) Lit. Rep. 164. like Point adjudged.

25. (i) If in a *Formedon* the Tenant is eſſoigned, and after the Writ abates by the Death of one of the Demandants, and a new Writ is brought by Journeys Accounts, he may in this Writ be eſſoigned again. Between *Brigham* and *Godwin*, 1 *Brownl.* 152. adjudged.

26. By the Statute of *Weſtm.* 2. made 13 *E.* 1. *c.* 12. In an Appeal of Death, the Appealor ſhall not be eſſoigned.

(R) At what Time it may be.

1. AT Common Law, in Treſpaſs, the Plaintiff might be eſſoigned after every Appearance. 11 H. 6. 31.

2. But it is otherways in Replevin, becauſe the Plaintiff may be Defendant in this. 11 H. 6. 31.

3. At Common Law it would lie after every mean Appearance. (a) 21 E. 4. 16. b. 11 H. 6. 31.

(a) Br. Eſſoign 113. S. C. Fitz. 121. S. C.

4. The Eſſoign lies after every Appearance in an Annuity. (b) 2 H. 4. 4.

(b) Br. Eſſoign 31. S. C. Fitz. 131. S. C.

5. In an Annuity againſt a Perſon after his Prayees in Aid are eſſoigned, at another Day the Attorney of the Defendant may be eſſoigned. (c) 2 H. 4. 4.

(c) Br. Eſſoign 31. S. C. Fitz. 131. S. C.

6. After a Venire awarded againſt an Infant to be viewed where the Iſſue is upon the Infancy, or after the Guardian is commanded to bring the Infant into Court to be viewed, the Infant cannot be eſſoigned. (d) 41 E. 3. 29.

(d) Br. Eſſoign 20. S. C. Fitz. 146. S. C.

7. In Debt the Defendant came by Capias and waged his Law, and found Mainprize, at the Day he had to do his Law he cannot be eſſoigned. (e) 44 E. 3. 12.

(e) Br. Eſſoign 25. S. C. Fitz. 150. S. C.

8. (f) At the Exigent returned in Debt, the Plaintiff may be eſſoigned. (g) 45 E. 3. 10. b. but he rendered himſelf before the Return.

(f) 2 Inſt. 417. (g) Fitz. Eſſoign 155. S. C.

9. At the Return of a Summons ad warrantizandum, the Vouchee may be eſſoigned before Entry into Warranty, yet he is no Party before. (h) 45 E 3. 24. b.

(h) Br. Eſſoign 28. S. C. Fitz. 67. S. C.

10. (i) After Demurrer at the Day of Adjournment the Defendant may be eſſoigned. (k) 3 H. 4. 15. b.

(i) Kelw. 132. a. S. P. (k) Br. Eſſoign 33. S. C. Fitz. 133. S. C.

Adjudged.

11. At the fourth Day it ſhall be adjudged and adjourned. (l) 18 E. 4. 4. b.

(l) Br. Eſſoign 112.

12. In a *Præcipe quod reddat*, if a Verdict at the *Niſi prius* be given againſt the Tenant, and the Judgment is not given at the Day in Bank, but the Parties are adjourned till the next Term, whether the Tenant can be then eſſoigned, *Kelw.* 132. *dubitatur.*

(S) At what Time it may be caſt.

1. THE Eſſoign for the Demandant ought to be caſt the firſt Day of the Four, for it does not lie after the firſt Day, becauſe he was demandable the firſt Day. (m) 12 H. 4. 24. b. Curia. (n) 18 E. 4. 4. b.

(m) Br. Eſſoign 45. S. C. Fitz. 140. S. C. (n) Br. Eſſoign 112. S. C.

2. The Eſſoign does not lie for the Demandant at the fourth Day, tho' he be demanded. 10 H. 6. 3. b.

3. But by the Aſſent of the Parties it may be caſt at the ſecond or fourth Day. (o) 18 E. 4. 4. b.

Fol. 824.

(o) Br. Eſſoign 112. S. C.

4. But the Tenant may be eſſoigned at the fourth Day, becauſe (p) he is not bound to appear before the fourth Day, vide 12 H. 4. 25. contra 10 H. 6. 3. b.

(p) In the Original it is il n'ad miſtier d'appeer, &c.

5. But if an Eſſoign of the King's Service be caſt for the Tenant the firſt Day, where there is no ſuch in rerum Natura, which is not good at the fourth Day, another Eſſoign cannot by another be caſt for him. (q) 12 H. 4. 24. But Quære rationem.

(q) Br. Eſſoign 45. S. C. Fitz. 140. S. C.

6. In a Formedon, if no Eſſoign be caſt the firſt Day and recorded, it cannot be caſt after, for the Tenant is demandable the firſt Day, but there ſhall be no Judgment upon the Default till the fourth Day, and yet the Tenant need not appear till the fourth Day. (a) 12 H. 4. 24.

(a) Br. Eſſoign 45. S. C. Fitz. 140. S. C.

7. In an Annuity againſt a Parſon, the Sheriff returns, that he is a Clerk, upon which a Venire facias iſſues to the Sheriff, he cannot be eſſoigned at the Return thereof. (b) 38 E. 3. 21. b. But Quære.

(b) Fitz. Eſſoign 145. S. C.

8. (c) If in Dower the Tenant at the Day of the Eſſoign does not caſt any Eſſoign, and the Demandant enters (d) her Exception, if the Writ is not returned, the Tenant upon Motion (e) may be eſſoigned notwithſtanding the Exception. *Hill.* 16 *Jac.* Between *Egerton* and *Egerton*, *Hut.* 28. reſolved, and the (f) 2 *H.* 7. 4. is there cited, in which a Difference is taken between an original and judicial Writ, and ſaid, that in the laſt, the Eſſoign muſt be the firſt Day, or not at all, if challenged.

(c) Lit. Rep. 185. S. P. because the Demandant ought to procure a Return of the Writ.

(d) I ſuppoſe this is intended of a Ne recipiatur. 124. S. C. Br. 141. S. C.

(e) But vid. Dal. 3. Godb. 236.

(f) Fitz. Eſſoign

(T) At what Time it lies.

1. If he in Reverſion prays to be received for Default of the Leſſee, and the Reſceit is counterpleaded before it is tried, he cannot be eſſoigned, becauſe he is not Party before. (g) 17 E. 3. 38.

(g) Fitz. Eſſoign 2. S. C.

2. But after Reſceit he may be eſſoigned. (h) 17 E. 3. 38. b.

(h) Fitz. Eſſoign 2. S. C.

3. A Prayee in Aid may be eſſoigned at the Return of the Summons before Joinder in Aid. (i) 1 H. 6. 3. b. (k) 3 H. 6. 30. b.

(i) Fitz. Eſſoign 89.

(k) Br. Protection 2. S. C.

4. A Vouchee may be eſſoigned at the Return of the Summons ad warrantizandum before Entry into Warranty, for the Demandant hath made him privy by Grant of the Voucher. (l) 3 H. 6. 30.

(l) Br. Protection 2. S. C. Fitz. 3. S. C.

5. But if the Writ be returned tarde (m) he cannot be eſſoigned, becauſe he is not ſummoned. (n) 39 E. 3. 28.

(m) Dyer 252. a. S. P.

(n) Fitz. Eſſoign 144. S. C.

6. In a Formedon againſt Baron and Feme, if the Baron makes Default at the Niſi prius, and before the Day in Bank the King dies, by which all is diſcontinued; if the Reſummons be ſued againſt Baron and Feme, they cannot be eſſoigned. (o) 1 H. 6. 6.

(o) Br. Eſſoign 84. S. C. Fitz. 90. S. C.

7. After Iſſue joined, and a Venire facias abated, at the Return of the new Venire facias the Defendant may be eſſoigned, tho' this be not the firſt Day after the Parties have pleaded to the Inqueſt. (p) 21 E. 3. 38. b. adjudged.

(p) Br. Eſſoign 58. S. C.

8. After Iſſue joined, and a Venire facias returned, the Tenant may be eſſoigned. 7 H. 6. (q) 17.

(q) I ſuppoſe this is miſprinted, and ſhould be 14, which vid. Br. Eſſoign 61.

9. After Iſſue, and Iſſues returned againſt the Jury upon the Diſtringas, and an Alias prayed with a Niſi prius, the Defendant cannot be eſſoigned de ſervitio Regis, becauſe it is only the Suggeſtion of the Party. (r) 3 H. 6. 55. b.

(r) Br. Eſſoign 2. S. C.

10. In Replevin the Plaintiff may be eſſoigned after Iſſue joined, and at the Habeas Corpora. 11 H. 6. 31. b.

11. In an Aſſiſe by Two, upon Default of one, if the other ſues a Summons ad ſequendum ſimul againſt him, he cannot be eſſoigned at the Return thereof. (a) 10 H. 6. 22. (a) Br. Eſſoign 144. S. C. Fitz. 109. S. C.

12. At the Petit Cape returned, an Aſſiſe does not lie for the Tenant. (b) 19 H. 6. 57. b. (b) Br. Eſſoign 66. S. C. Fitz. 105. S. C.

13. But if at the Return of the Petit Cape, a Protection be caſt for the Tenant, and after it is repealed, and a Reſummons ſued, now the Tenant may be eſſoigned. (c) 19 H. 6. 57. b. (c) Br. Eſſoign 66. S. C. Fitz. 105. S. C.

Eſſoign after Eſſoign.

14. A common Eſſoign does not lie immediately after another Eſſoign. (d) 12 H. 4. 14. (e) 4 H. 6. 6. b. (d) Br. Eſſoign 42. S. C. Fitz. 138. S. C. (e) Fitz. Eſſoign 91. S. C. Br. 73. S. C.

15. An Eſſoign de ſervitio Regis does not lie immediately after a common Eſſoign. (f) 12 H. 4. 14. contra. (f) Br. Eſſoign 42. S. C. Fitz. 138. S. C.

16. A common Eſſoign does not lie immediately after an Eſſoign de ſervitio Regis. (g) 12 H. 4. 14. Fol. 825. (g) Br. Eſſoign 42. Fitz. 138. S. C.

17. An Eſſoign de ſervitio Regis does not lie after another Eſſoign de ſervitio Regis immediately. (h) 12 H. 4. 14. (h) Br. Eſſoign 42. S. C. Fitz. 138. S. C.

18. An Eſſoign de ſervitio Regis does not lie after another Eſſoign de ſervitio Regis, if the firſt Eſſoign be not warranted. (i) 17 E. 3. 3. (i) Fitz. Eſſoign 1. S. C.

19. After Proceſs intermediate, a Man may be eſſoigned after an Eſſoign. 12 H. 4. 14.

20. As if a Man be eſſoigned at the firſt Day, if he comes after the View, he may be eſſoigned again. 12 H. 4. 14.

21. If a Man be eſſoigned de ſervitio Regis, and after caſts a Protection, if a Reſummons be ſued, he may be eſſoigned de communi eſſonio, for tho' the Reſummons revives the Plea to ſome Reſpects, yet here the Reſummons is an intermediate Proceſs. (k) 12 H. 4. 14. Vide (l) 1 H. 6. 6. (k) Br. Eſſoign 42. S. C. Fitz. 138. S. C. (l) Br. Eſſoign 84. S. C. Fitz. 90. S. C.

22. The ſame Law if the Parol be put without Day for any other Cauſe. 17 E. 3. 3.

23. In a Plea, an Eſſoign de ſervitio Regis may be caſt by intermediate Proceſs after an Eſſoign de ſervitio. 12 H. 4. 14.

24. If a Man be eſſoigned de ſervitio Regis, and after makes Default, at the Petit Cape returned he may be eſſoigned de ſervitio Regis. (m) 12 H. 4. 15. (m) Br. Eſſoign 42. S. C. Fitz. 138. S. C.

25. In a Formedon in Reverter, if the Tenant be eſſoigned after View, and after pleads in Abatement of the Writ, and after vouches Two, viz. A. and B. of which A. is after eſſoigned, and after B. & idem dies given to the Demandant, Tenant and Vouchee, and at the laſt Day of the Eſſoign both Vouchees appear, and at the ſame Day the Tenant caſts an Eſſoign for himſelf and his Attorney, (n) this Eſſoign for the Tenant lies; for tho' the Tenant had an Eſſoign before, this was in another Reſpect, ſcilicet, between him and the Demandant; but now he is in another Degree and Order of Plea, ſcilicet, between him and the other Vouchee, who never being entered into Warranty, might vouch, or the Tenant: (o) But if he was actually entered into Warranty, then he could not (n) Winch 34. S. P. adjudged. (o) For this vid. 1 Rol. Abr. 819. F. 1, 2, 4.

not be another Time eſſoigned, nor the Tenant who had ended with the Vouchee, and alſo was out of Pleading againſt the Demandant, becauſe his Plea was put in the Mouth of the Vouchee. Hobart's Reports 64. (a) Between the Earl of Clanrickard and the Viſcount Liſle adjudged; contra (b) 3 H. 7. 13.

(a) Hob. fol. 46. S. C. 1 Brownl. 154. S. C. adjudged, Winch 34. S. C. cited, 2 Vent. 57. S. C. cited. (b) Br. Eſſoign 104. S. C. Fitz. 125. S.C.

26. In a Writ of Right, the Summons being returned, but not the Proclamations made at the Church, &c. according to the Statute 31 *El.* the Tenant caſt an Eſſoign, and it was adjourned in the Eſſoign-Roll; but the Demandants perceiving the Return inſufficient, ſued out an *Alias* Summons, and upon the Return thereof the Tenant caſt an Eſſoign. *Hill.* 18 *Jac.* (c) The Earl of *Clanrickard*'s Caſe, *Hut.* 43. it ſeemed to the Court, that the firſt was as null, and therefore the ſecond good; but in the End of the Caſe it is ſaid, tho' the Party might appear to the firſt Writ, yet he need not caſt an Eſſoign, for the Nature of that is to ſave a Default, that no *Grand Cape* be awarded, and here no *Grand Cape* ought to be awarded, and therefore the Eſſoign before not avoidable.

(c) 1 Jon. 7. S. C. adjudged.

27. By the Statute of *Marlbr.* made 52 *H.* 3. *cap.* 13. when (d) a Man puts himſelf upon (e) any Inqueſt, he ſhall have (f) but (g) one Eſſoign, or one Default, ſo that if he comes not (h) at the Day given by the Eſſoign, or makes Default the ſecond Day, then the Inqueſt (i) ſhall be taken by (k) his Default, and (l) if the Inqueſt be taken in the County before the Sheriff or Coroner, to be returned to the King's Juſtices at a certain Day, if the Defendant comes not that Day, another Day ſhall be aſſigned, and the Sheriff commanded to cauſe him to come to hear Judgment; at which Day, if he comes not, they ſhall proceed to Judgment.

(d) But if there be divers Tenants in a Præcipe, or divers Defendants in a Perſonal Action, tho' in Law they be but one Tenant or Defendant, yet each of them ſhall have one Eſſoign. 2 Inſt. 126.

(e) That is, when an Iſſue is joined to be tried by the Country; but it extends not to a Demurrer; nor where in Debt a Cuſtom of London is alledged, and denied by the Plaintiff, which is to be tried by a Certificate of the Mayor, by the Mouth of the Recorder. 2 Inſt. 126. (f) The Act being made to reſtrain Delays, does not give an Eſſoign where none before lay, as after Iſſue joined in a Scire facias, &c. 2 Inſt. 126. Godb. 236. (g) Intended of the common Eſſoign, and not of an Eſſoign de ſervitio Regis, &c. 2 Inſt. 126. (h) Upon the Return of the Venire, and when that was returned at the Niſi prius, the Defendant might be eſſoigned there; but now being returned above, he muſt be eſſoigned there, and cannot be at the Trial. Salk. 454. (i) The Act only extends to Perſonal Actions, for that no Inqueſt can in Real Actions be taken by Default. 2 Inſt. 126. Godb. 236. (k) It extends not to the Plaintiff, for on his Side it is called a Default, and the Plaintiff's Delay is out of the Miſchief of the Act. 2 Inſt. 126. (l) The Meaning of this Clauſe is, that if after Iſſue joined in a baſe Court, the Defendant hath had his Eſſoign, yet if the Plea be removed before the King's Juſtices, he ſhall have another Eſſoign before them, for that the Proceeding in the baſe Court is not of Record before them. 2 Inſt. 127.

28. By the Statute *Weſtm.* 1. made 3 *Ed.* 1. *cap.* 41. In Writs of (m) Aſſiſe, (n) Attaint, and *Juris utrum*, (o) after Appearance the (p) Tenant ſhall not be (q) eſſoigned.

(m) This must be intended of an Aſſiſe of Mortdanceſtor, for that an Eſſoign does not lie in an Aſſiſe of Novel Diſſeiſin. 2 Inſt. 249. (n) By 5 E. 3. cap. 6. an Eſſoign lies not in Attaint. (o) But if in an Aſſiſe of Mortdanceſtor brought in Cheſter, and by Reaſon of a foreign Voucher the Record is removed in Banco, the Tenant may be eſſoigned there, for that the Plea there is only on the Warranty, and the Aſſiſe ſhall not be taken there. 2 Inſt. 249. (p) This extends not to the Demandant, but that is provided for by the 13 E. 1. cap. 28. (q) It muſt be taken of a common Eſſoign. 2 Inſt. 249.

29. By the Statute of *Weſtm.* 2. made 13 *Ed.* 1. *cap.* 27. after Iſſue joined, (r) an Eſſoign ſhall be (s) allowed (t) at the next Day, but at the following Days (u) the Taking the Inqueſt ſhall not be delayed, nor ſhall

(r) Intended only of a common Eſſoign, and not of an Eſſoign de ſervitio Regis. 2 Inſt. 417. (s) That is where an Eſſoign lies, but not if he comes in by Exigent, or Cepi Corpus, and joins Iſſue. 2 Inſt. 417. (t) It was provided by the Statute of Marlbridge above, that after Iſſue the Defendant ſhould have but one Eſſoign, but not limited when they ſhould have that Eſſoign, ſo the Defendants would not be eſſoigned but at the Habeas Corpora, to the Vexation and Loſs of the Jurors; but this Act has provided it ſhall be at the next Day, viz. the Venire. 2 Inſt. 417. (u) Intended only in a Plea Perſonal. 2 Inſt. 417.

an Eſſoign be allowed after Day given by *Prece partium*, (a) in Caſe where the Parties conſent to come without Eſſoign.

(a) The Day being given by Prayer and Agreement of the Parties, without any Eſſoign. 2 Inſt. 417.

(U) Trial of an Eſſoign.

By whom.

1. IF an Eſſoign be caſt quia nutrix of A. the Daughter of the King, the Plaintiff cannot take an Averment, that the ſaid A. is of full Age, and therefore is not to have a Nurſe, becauſe the Eſſoigner is no Party to this, and therefore the Eſſoign ſhall be adjudged and adjourned. 28 E. 3. 97. b. adjudged.

At what Time.

2. If an Eſſoign be challenged, becauſe this is for the Plaintiff where he hath an Attorney for whom the Eſſoign lies, this Challenge ſhall be tried at the Day which is given by the Eſſoign, and not preſently, becauſe the Eſſoignor cannot be Party to try any Challenge. (b) 45 E. 3. 10. b. (c) 12 H. 4. 14. 1 E. 3. 2.

(b) Fitz. Eſſoign 155. S. C.

(c) Br. Eſſoign 42. S. C. Fitz. 138. S. C.

3. But where an Eſſoign is challenged, becauſe he was ſeen in Court, it ſhall be tried at the ſame Day, becauſe it lies in View and Record of the Court. (d) 45 E. 3. 10. b.

(d) Fitz. Eſſoign 155. S. C.

For the Tenant.

Fol. 826.

4. If an Eſſoign be caſt for the Attorney, and the Demandant challenges it, that another was made Attorney in the Plea, who is not eſſoigned, this cannot be tried preſently, whether the firſt Attorney was removed, or other Matter, &c. becauſe the Eſſoignor is no Party to the Challenge to try it. (e) 11 H. 4. 87. b.

(e) Br. Eſſoign 41. S. C. Fitz. 137. S. C.

5. When the Challenge cannot be tried preſently, the Eſſoign ſhall be adjourned upon the Challenge, but not adjudged. (f) 11 H. 4. 87. b.

(f) Br. Eſſoign 41. S. C. Fitz. 137. S. C.

(X) In what Caſes it ſhall be (g) adjourned and adjudged.

(g) Where by this all Proceſs is ſtayed. 1 Leon. 134. 2 Leon. 4, 185. — Upon ſuch Adjournment *idem dies* ought to be given to the Plaintiff.

1. IN a Quare Impedit, if an Eſſoign be caſt for the Plaintiff, and the Defendant hath an Attorney in the Plea, who is not eſſoigned, it ſhall not be adjudged; becauſe, if it be true, it ſhall be diſallowed, but it ſhall be adjourned, becauſe the Attorney may be removed by the Plaintiff. (h) 14 H. 4. 13.

Carth. 173. per Curiam. —— And how the Proceedings ſhall be thereupon. Vid. Lutw. 862. a. b.

(h) Br. Eſſoign 46. S. C. Fitz. 141. S. C. Lutw. 863. S. C. cited.

In what Caſes it ſhall be adjudged and adjourned.

2. If the Demandant be eſſoigned, and at the ſame Day a Protection is caſt for the Tenant, the Eſſoign ſhall be adjudged, becauſe the Demandant ſhall not be nonſuited; but it ſhall not be adjourned, becauſe the Parol is put without Day by the Protection.

(a) Br. Eſſoign 38, 43. S. C. Fitz. 174. S. C. (a) 12 H. 4. 25. b.

3. By the Statute of *Glouceſt.* made 6 *E.* 1. *cap.* 8. In Treſpaſs, if the Plaintiffs cauſe themſelves to be eſſoigned after the firſt Appearance, Day ſhall be given them, unto the coming of the (b) Juſtices, *&c.*

(b) The Authority of the Juſtices in Eyre being ceaſed, there can be now no ſuch Adjournment. 2 Inſt. 314.

Eſſoign warranted.

(Y) In what Caſes it ought to be made.

(c) Cap. 19. By which Act it is provided, that in Counties, Hundreds, Courts-Baron, or other Courts nullus habet neceſſe jurare pro eſſonio ſuo warrantizando; and tho' this Act ſpeaks generally of Eſſoigns, yet it is to be underſtood only of the common Eſſoign de malo veniendi, which hath been ſo conſtrued by Reaſon of the great Delay by the Eſſoign de ſervitio Regis, &c. and he that caſts that muſt ſtill be ſworn. —— And tho' the Act begins with inferior Courts, yet it hath been conſtrued to extend to the Superior, for that otherways the Words other Courts muſt be void, none being lower than thoſe named particularly. 2 Inſt. 137. (d) 2 Inſt. 137. (e) Br. Eſſoign 45. S. C.

1. Before the Statute of Marlbridge, cap. (c) 20. at Common Law in an Eſſoign de malo veniendi, the Eſſoigner ought to have ſworn, (d) that his Maſter was ſo ill by the Way that he could not come. (e) 12 H. 4. 24. b. 25. b.

(f) Br. Eſſoign 108. S. C.

2. But this is taken away by the Statute in Caſe of common Eſſoigns. (f) 2 E. 4. 17.

(g) Br. Eſſoign 42. S. C. Fitz. 138. S. C.

3. If a Man be eſſoigned de ſervitio Regis, and after a Protection is caſt for him, if a Reſummons be ſued, this revives the Whole, and therefore the Eſſoign ought to be warranted. (g) 12 H. 4. 14. b.

(h) Fitz. Eſſoign 8. S. C. Br. 53. S. C.

4. An Eſſoign de ſervitio Regis ought to be warranted. 21 E. 3. (h) 13. (i) 37. 62.

(i) Br. Eſſoign 57. S. C.

(k) Fitz. Eſſoign 7. S. C.

5. If a Woman be eſſoigned quia nutrix to the King's Son, this Eſſoign ought to be warranted. (k) 30 E. 3. 19. b.

(l) Fitz. Eſſoign 7. S. C.

6. But when the Eſſoign is caſt, there is no Neceſſity to ſhew any Thing, proving the Woman to be Nurſe to him, for the Warrant may be brought at the next Day. (l) 30 E. 3. 19. b.

(m) Fitz. Eſſoign 59. S. C.

7. If the Tenant be eſſoigned de ſervitio Regis, and before the Day that he hath thereby, the Parol is diſcontinued by the Death of the King, and a Reſummons ſued, yet the Tenant need not warrant the Eſſoign at the Day; for he is not upon the Reſummons to anſwer to any Default, and the Juſtices now are not Juſtices of the late King. (m) 1 E. 3. 7. b. adjudged.

8. If a Tenant be eſſoigned *de ſervitio Regis*, and hath a Day to bring in his Warrant, and at the Day comes and pleads, that the Demandant hath releaſed to him all the Right which he hath in the Land, but does not bring any Warrant to warrant the Eſſoign, and whether he ſhall be received to plead this Releaſe, *Kelw.* 135. *dubitatur*; and *Keble* took a Diverſity, whether the Releaſe was made before or after the Eſſoign caſt; and if after, ſaid, the Tenant had no Day before to plead it, and by the Releaſe the Right accruing by the Default was diſcharged.

(Z) At what Time it ought to be ſhewed.

1. When an Eſſoign is caſt, it ought to be warranted at the Day he hath by the Eſſoign, or (a) otherways there ſhall be a (b) Default at the Eſſoign caſt. 21 E. 3. (c) 13. (d) 37, 62. b.

(a) Sleigh and Chetham, Lutw. 849, &c. 3 Levinz 67. Carth. 45. 1 Show. 20, 65.

(b) And in Perſonal Actions the Inqueſt ſhall be taken by Default, and in Real a Petit Cape or Grand Cape ſhall lie. 2 Inſt. 314.

(c) Br. Eſſoign 53. S. C. Fitz. 8. S. C.

(d) Br. Eſſoign 57. S. C.

2. If a Man be eſſoigned de ſervitio Regis, and at the Day a Protection is caſt, and after a Reſummons is ſued, and the Party is ſummoned (e) of a common Eſſoign, he need not ſhew the Warrant of the firſt Eſſoign at this Day, in as much as his Abſence is excus'd by this. (f) 12 H. 4. 14. b.

Fol. 827.

(e) This is tranſlated according to the Original, but the Senſe ſeems imperfect, and that after the Word ſummoned, theſe Words ſhould follow, viz. and caſts a common Eſſoign.

(f) Br. Eſſoign 42. S. C. Fitz. 138. S. C.

3. But at the Day that he hath by the laſt Eſſoign he ſhall ſhew both Warrants. (g) 12 H. 4. 14. b.

(g) Br. Eſſoign 42. S. C. Fitz. 138. S. C.

4. If a Man be eſſoigned de ſervitio Regis before Appearance, and after makes Default, by which a Grand Cape iſſues, at the Return, if he appears, and does not warrant the Eſſoign, he ſhall loſe the Land. (h) 12 H. 4. 14. b. Curia.

(h) Br. Eſſoign 42. S. C. Fitz. 138. S. C. Lutw. 863. S. C. cited.

5. If the Demandant or Plaintiff be eſſoigned *de ſervitio Regis*, and at the Day brings not in his Warrant, this ſhall be adjudged a Nonſuit. 2 *Inſt.* 314.

6. By the Statute of *Glouceſter*, made 6 *E.* 1. *cap.* 8. In Treſpaſs and other Pleas, (i) where Attachment and Diſtreſſes lie, if the (k) Defendant eſſoign himſelf of the King's Service, and bring not in his Warrant at the Day given by the Eſſoign, he ſhall recompence the Plaintiff Damages for his Journey, 20 *s.* or more, at the Diſcretion of the Juſtices, and be amerced to the King.

(i) Extends only to Perſonal Actions. 2 Inſt. 314.

(k) If there be ſeveral Defendants, each ſhall pay 20 s. for they are in Law ſeveral Eſſoigns. 2 Inſt. 314.

7. If in Dower the Tenant is eſſoigned, and the Eſſoign adjourned; now if the Demandant does not appear at the Day to which the Adjournment was made, the Demandant ſhall be nonſuit. *Hil.* 1 *Will. & Mar. Anonymus.* 2 *Vent.* 117. *per Curiam.*

(A) War-

(A) Warranty of the Eſſoign.

(a) In ſuch Caſe the Tenant may diſavow, and aver quod nunquam fecit ſe eſſoniari. Lutw. 865.

1. IF an Eſſoign be caſt by a (a) Stranger, and a Day given by the Eſſoign, whether the ſame Day to bring in the Warrant of the Eſſoign ſhall be given to the Eſſoigner or Tenant himſelf, Dubitatur, Dy. 4, 5. Ma. 154. 16.

2. If an Eſſoign be caſt by a Stranger Octabis Trin. if the Utas be dies Dominicus & non juridicus, the Warranty ſhall be to warrant the Abſence of the Party Octabis Trin. generally, and not die Lunæ in Octabis Trin. Dy. 4, 5 Mar. 154. 16, 17.

How it ought to be.

(b) Br. Eſſoign 42. S.C. Fitz. 158. S.C.

3. An Eſſoign de ſervitio Regis ought to be warranted by Writ out of Chancery, and not by the King's Letters Patents. (b) 12 H. 4. 15.

(c) Where Day was given to have a Warrant under the Great Seal, and not under the Seal of the Captain. Dal. 46.

4. Whether the Warranty of the Eſſoign ought to be by (c) Letters Patent, or (d) by cloſe Writ, Quære, Dy. 4, 5. Ma. 154. 16.

(d) A Warrant under the Privy Seal is not ſufficient, but it muſt be by Writ under the Great Seal, directed to the Juſtices, teſtifying that he is in the King's Service, which commonly is upon Certificate made to the Lord Chancellor by the Captain of the Hoſt under whom he ſerves. 2 Inſt. 314. 2 Rol. Abr. 183. pl. 7. 2 Co. 17. b.

(e) He that caſts an Eſſoign de ſervitio Regis, muſt appear in Perſon in Court, to the End he may be ſworn, and that Day may be given to bring in the Warrant for the Eſſoign. 2 Inſt. 314. —— The Statute of Marlbridge, cap. 19. extends only to common Eſſoigns. 2 Inſt. 137.

5. Whether the Warranty ought to recite the Eſſoign, and the (e) Eſſoignor be ſworn (for he ought to ſwear de veritate eſſonii,) Quære, Dy. 4, 5. Ma. 154. 16.

(B) How it ſhall be done.

(f) By 5 Ed. 3. cap. 6. An Eſſoign de ſervitio Regis does not now lie in an Attaint.

1. IF an Eſſoign de ſervitio Regis be caſt for the Tenant (f) in an Attaint, this may after be warranted by a Writ which agrees with the Eſſoign, tho' this does not agree with the Original of the Attaint. (g) 4 Aſſ. 2. adjudged.

(g) Br. Eſſoign 86. S. C. Fitz. 63. S. C.

How it ſhall be entered.

Between whom.

1. IF in a *Formedon* ſome of the Demandants refuſing to proceed, a Summons *ad ſequendum ſimul* iſſues againſt them, and they are eſſoigned, it ſhall be againſt the Tenant in the Writ of *Formedon*. *Trin.* 4 & 5 *Ph. & Mar. Bendl.* 58. *pl.* 98. *per Curiam.*

2. If the Tenant be eſſoigned before the Vouchee enters into Warranty, ſo that the Eſſoign is granted in Reſpect of the Pleas which may ariſe between the Vouchee and Tenant, yet it is to be entered between the Tenant and Demandant, and not between the Tenant and Vouchee,

Vouchee, and *idem dies* is ſtill to be given to the (h) Parties not eſſoigned. In the Caſe of the Earl of *Clanrickard*. *Hob.* 47.

(h) Not to thoſe that make Default. Cro. Car. 341. 1 Jon. 331. Noy 144. But for this vide my 2d Part 155. pl. 5.

(a) Eſſoign after an Eſſoign.

(a) 1 Rol. Abr. 824. pl. 14, 15. 825. pl. 25.

1. IN a *Præcipe* brought againſt Two or more Tenants, (b) each of them may have one Eſſoign. 2 *Inſt.* 250.

(b) 2 Inſt. 126. vide.

2. In a *Formedon* by ſeveral Demandants, ſome of them would not proceed; whereupon a Summons *ad ſequendum ſimul* was awarded againſt them, and at the Return thereof the Defendants would have been ſeverally eſſoigned againſt the Demandants in the Writ of Summons, *&c.* *Trin.* 4 & 5 *Ph. & Mar. Bendl.* 58. *pl.* 98. *per Cur'*, all the Defendants in the Summons, *&c.* ſhall have but one Eſſoign for them all, and that againſt the Tenant in the *Formedon*.

Fourcher by Eſſoign.

1. FOurcher by Eſſoign on the Part of the Tenant is when a *Præcipe* is brought againſt Two or more Tenants, and after each of them hath had one Eſſoign, they over again delay the Demandant by ſucceſſive Eſſoigns.

2. As if a *Præcipe* is brought againſt *A.* and *B.* and *A.* is eſſoigned, and *B.* appears and hath *idem dies* given him, at which Day *A.* appears, and *B.* is eſſoigned, and at the next Day *B.* appears and *A.* is eſſoigned, & *ſic viciſſim & alternis vicibus.* 2 *Inſt.* 250. but the Book ſeems miſprinted.

3. By the Statute of *Weſtm.* 1. made 3 *Ed.* 1. *cap.* 42. For as much as (c) Demandants are often delayed, *&c.* it is (d) enacted, that Parceners (e) or (f) Tenants jointly infeoffed, ſhall not (g) Fourch by (h) Eſſoign, and ſhall have but (i) one Eſſoign.

(c) This extends only to real Actions.

(d) It is ſaid the Statute of Glouceſter, made 6 E. 1. in which this Act is recited, extends to the common Eſſoign, and not to the Eſſoign de ſervitio Regis. 2 Inſt. 321. (e) Extends not to Demandants. 2 Inſt. 251. (f) In an Annuity againſt a Parſon, he prays in Aid of the Patron and Ordinary, and after each of them had had one Eſſoign, they would have fourched; and tho' the Prieſt in Aid was no Party to the Writ, the Court would not ſuffer it. 2 Inſt. 251. —— The Act extends not to Baron and Feme, unleſs they are jointly enfeoff'd, but it is remedied by the Statute of Glouceſter, made 6 Ed. 1. cap. 10. 2 Inſt. 251, 321. (g) This muſt be intended after Appearance, for there is no Fourcher but after former Eſſoigns and reciprocal Appearances. 2 Inſt. 251. and till then it cannot appear whether they are Tenants. Hob. 8. 1 Brownl. 15. 2 Vent. 57. (h) Extends not to a Writ of Partition. Hob. 8. per Hobart. (i) That is, every one of them ſhall have one, and a Fourcher, viz. a Viciſſitude of Eſſoigns after each of them hath been eſſoigned, is only prohibited by the Act. 2 Inſt. 250.

Eſtate.

(A) By whom, and to whom it may be made.

(a) A Man cannot by the Rule of Law

1. AN Eſtate cannot be limited to the (a) Party himſelf, who gives it on a (b) Grant.

give himſelf an Eſtate in Poſſeſſion or Remainder, unleſs perhaps in ſome Caſes by Concluſion. 1 Co. 127. a.

(b) On a Grant at Common Law; but a Man may covenant to ſtand ſeiſed to the Uſe of himſelf for Life, &c. 1 Rep. 127. a. 1 Mod. 121, 238.

(c) 2 Rol. Abr. 7. pl. 7.

2. (c) If a Man gives to A. for Life, reſerving the Reverſion to himſelf for Life, the Remainder over to another, it is a void Reſervation of the Reverſion to him. 42 Aſſ. 2. Dubitatur.

3. So an Eſtate cannot be limited to the Heir of the Donor on a Grant.

(d) Co. Lit. 22. b. S. P. 2 Mod. 209.

(e) So if the Gift be to him in Tail, Remainder to the right Heirs of the Donor. Co. Lit. 22. b.

4. (d) If a Man gives to one for (e) Life, the Remainder to the right Heirs of the Donor, it is a void Remainder, becauſe he cannot make his right Heir a Purchaſer, (f) without departing of the Fee out of himſelf. (g) Dy. 4, 5 Ma. 156, 25.

(f) Becauſe the Heir and Anceſtor are Correlatives and one Thing in the Eye of the Law. 1 Mod. 98. per Hale, and 1 Mod. 237. many Caſes cited to the ſame Purpoſe.

(g) 2 Rol. Abr. 415. Dy. 1. S. C. 1 And. 3. S. C. adjudged, Bendl. 49. S. C. Hob. 30. S. C. cited.

* Fol. 828.

* 5. A Man cannot leaſe to one for Life, reſerving a Fee-tail to himſelf, he having a Fee before. (h) 14 H. 4. 32.

(h) Br. Eſtate 14. S. C. Br. Tail 11. S. C. Fitz. Monſtrans de faits, &c. 131. S. C.

6. So if Tenant in Fee levies a Fine to one for Life, reſerving a Tail to himſelf, it is no good Tail. (i) 14 H. 4. 31. b.

(i) Fitz. Monſtrans de faits, &c. S. C. and vide Br. Eſtates 66.

(k) Where not even by Deviſe. Cro. El. 96, 97. Cro. Car. 24.

7. If one leaſes for Life, Remainder to the Heirs Male of his own Body, this is a void Remainder; for the Donor cannot make his own right Heir a Purchaſer of an Eſtate-tail, (k) without departing with the whole Fee-ſimple out of him. *Co. Lit.* 22. *b.*

8. But if one makes a Feoffment in Fee to the Uſe of himſelf for Life, and then to the Uſe of the Heirs Male of his Body; this is a good Eſtate-tail executed in himſelf, (l) being raiſed out of the Eſtate of the Feoffees, which the Feoffor departed with. *Co. Lit.* 22. *b.*

(l) So if one Covenants to ſtand ſeiſed to the Uſe of his Heirs Males on the Body of his ſecond Wife, he takes an Eſtate for Life by Implication, and ſo it is an Eſtate-tail executed in himſelf. Pybus and Mitford, 2 Levinz 75. adjudged, 1 Vent. 372. adjudged, Raym. 228. adjudged, 1 Mod. 98, 122, 159. 3 Keb. 229, &c. —— But if one makes a Leaſe and Releaſe to the Uſe of himſelf for ninety-nine Years, Remainder to Truſtees for twenty-five Years, Remainder to the Heirs Male of his own Body; this Limitation to the Heirs Male of, &c. is void, there being no Eſtate of Freehold limited to ſupport it, and one cannot be implied contrary to the Intent of the Conveyance, and this Eſtate takes Effect out of the Seiſin of the Truſtees, and is not like Mitford's Caſe, where one covenanted to ſtand ſeiſed to the Uſe of the Heirs of his own Body; and even in that Caſe Powel ſaid, if there had been an expreſs Eſtate (I ſuppoſe he intended for Years) limited to the Covenantor, it would have been otherwiſe. Salk. 679. adjudged.

9. If one levies a Fine to the Uſe of his Wife for Life, the Remainder to the Uſe of his eldeſt Son, and the Heir Male of his Body, and for Want of ſuch Iſſue, to the Uſe of his own right Heir; this Limitation to the Uſe of his right Heir is meerly void, and he hath a Reverſion and not a Remainder in him. *Paſch.* 31 *El.* Between (a) *Fenwick* and *Mitford*, 1 *Leon.* 182. adjudged.

(a) Moor 284. pl. 437. S. C. adjudged, tho' contrary to the Opinion of ſome of the then Judges. 1 And. 288. pl. 297. S. C. adjudged, and ſaid the Limitation was void, for it could not take Effect in the Heir of him that limited it otherwiſe than by Diſcent, but for this and that it is the old Uſe, vid. 2 Rol. Abr. 414. A. 1. and the Notes there.

Eſtate of (b) *Freehold.*

(B) (c) Cannot be granted (d) to commence at a Day to come.

1. IF a Man makes a Deed of Leaſe of Land to hold for Life, from the Day of the Date, and makes Livery by Attorney the ſame Day ſecundum formam Chartæ, it is a void Leaſe, becauſe a Freehold cannot be granted in futuro, for the Day of the Date is excluded. Mich. 10 Car. B. R. inter (e) Bull and Wyott, per Curiam, agreed without Queſtion, and admitted, and Judgment given on another Matter, that being admitted. Paſch. 11 Car. B. R. inter Sir Kenelme Digby and Jordan, per Curiam, reſolved on Evidence at the Bar.

(b) But a Reverſion for Years may be granted to commence at a Day to come. 5 Co. 94. b. Palmer and Thorp, Cro. El. 152. 1 Leon. 171. and vid. Bridg. 108, 109.

(c) The great Reaſon thereof is from the Danger that would thence enſue to a Stranger's Precipe. 2 Vent. 204.

(d) Where a Copyholder cannot ſurrender habend' a tempore Mortis of the Copyholder; for that he muſt then leave a particular Eſtate in himſelf, which by the Rule of Law he cannot do. Vid. my ſecond Part 204. pl. 3. and vid. March 177, 178. but Q. of this and the Caſes ſince, not in print; the Freehold being in the Lord. —— Where A. gives Lands to B. habendum after the Death of A. and makes Livery ſecundum formam Chartæ, it is void. Vid. 2 Rol. Abr. 10. pl. 3. 66. pl. 4. Co. Lit. 48. b. —— Where a Man cannot give his Lands to another in Fee, reſerving to himſelf an Eſtate for Life. Vid. 2 Rol. Abr. 7. pl. 7.

(e) Cro. Car. 388. S. C. adjudged.

2. If a Man makes a Deed of Leaſe of Land to hold for Life, from the Day of the Date, and makes Livery himſelf the ſame Day, ſecundum formam Chartæ, it is a void Grant, becauſe the Day of the Date is excluded by the Deed, and the Livery hath Reference to the Deed, and a Freehold cannot be granted in futuro. Paſch. 15 Jac. in Camera Stellata, it was agreed by the Judges and the Court, Mich. 15 Jac. B. R. inter Seybrooke and Ball, admitted by the Court, which was the ſame Caſe that was in Camera Stellata; and in both Courts the Queſtion was, whether the Deed was from the Day of the Date, or at the Day of the Date, at the Time of the Making or made ſo afterwards; and it was found, that it was at the Making, from the Day of the Date, and ſo by Conſequence the Leaſe void. Paſch. 5 Jac. B. R. In (f) Hemings and Puncharden's Caſe, agreed by three Juſtices.

(f) Cro. Jac. 153. S. C. and S. P. by three Judges.

3. If A. be poſſeſſed for Years of a Portion of Tithes, the Reverſion being to B. in Fee, and B. by Indenture made between him of the one Part, and A. and C. of the other Part, recites the ſaid Leaſe, and confirms it, and then grants the Tithes to A. and C. habendum to C. after the Expiration of the ſaid Leaſe for a Month, and afterwards to A. in Fee, it is a void Grant of the Fee, becauſe it is to commence at a Day to come; for it cannot paſs by the Intent of the Deed as a Reverſion, forasmuch as by the ſame Deed he

he confirms the Leaſe, and grants the Fee to the ſame Leſſee; which if it ſhould be a Reverſion, then it would extinguiſh the Leaſe after the Month ended, and the Rent reſerved on the Leaſe extinguiſhed, and C. ought to have a Month after the Expiration of the firſt Term, therefore cannot have it as a Reverſion immediately. Trin. 15 Car. B. R. inter (a) Swifte and Aires, adjudged per Curiam on a Special Verdict. Intratur Trin. 12 Car. Rot. 426.

(a) Cro. Car. 546, 547. S.C. adjudged. March 31. S. C. adjudged. Jon. 436, 437. S. C. adjudged.

4. (b) If a Man makes a Deed of Leaſe for Life Habendum a die datus, and makes Livery (c) himſelf ſecundum formam Chartæ, the next Day, it is a good Eſtate for Life, for the Eſtate doth not paſs ſolely by the Deed, but principally by the Livery, for the Deed is not of Effect till the Livery, and therefore it cannot be ſaid that the Fabrick of the Deed is void, when nothing yet paſſed; and there the Inconvenience of the Operation of the Livery in futuro is taken away by the Making of the Livery the next Day, for that doth not relate to paſs the Eſtate from the Delivery of the Deed.

(b) Greenwood and Tiber like Point. Cro. Jac. 563. adjudged. Hob. 314. adjudged. Palm. 29, 30. &c. adjudged. Cro. Car. 95. S. C. cited. Hetl. 21, 22. judged. S. C. cited. Moor 759. Ow. 136. — So Smith and Bales, S. P. Cro. Jac. 458. adjudged. (c) If an Infant of Age makes a Feoffment or Leaſe for Life to commence in futuro, and after he comes Livery, it is good. 2 Rol. Rep. 109.

5. So it ſeems it would be, tho' the Leſſor made a Letter of Attorney to make Livery, and the Attorney made Livery (d) ſecundum formam Chartæ (e) the next Day, it is a good Eſtate, for he hath given Power to the Attorney to make Livery the ſame Day, and ſo to make it void, or to deliver it the next Day, and ſo to make it good. Paſch. 5 Jac. B. R. inter * Hemings and Pantherden on a Special Verdict, it was a Point not reſolved, but adjudged on another Matter. Contra Trin. 13 Jac. B. R. inter (f) Butler and Fincher adjudged.

(d) This muſt be intended where the Letter of Attorney is Special, to make Livery of Seiſin after the Date of the Charter, not where the Letter of Attorney is general, to make it ſecundum formam Chartæ. Cro. Jac. 563. Hob. 314. Palm. 31. Owen and Upjeece, Cro. Car. 95. Hetl. 20, 22, 27, 28. and vid. Cro. El. 585. Moor 875. pl. 1223. (e) Where Livery was made two Years after; and it was ſaid, that Livery made ſo long after would not help. Vid. Mellows and May, Cr. El. 873, 874. but by the Report in Moor 636. pl. 876. it was made within a Week, and good. (f) 1 Rol. Rep. 229, 230. S. C. 2 Bulſt. 302, 303, &c. S. C. 2 Rol. 109. S. C. cited.

* Fol. 829.

6. If a Man makes a Writing of Leaſe for Life Habendum a die datus, and ſeals it the next Day, and then makes Livery, it is a good Leaſe. Paſch. 5 Jac. B. R. inter (g) Hemings and Pantherden, per Popham.

(g) Cro. Jac. 153. S. C. and S. P. per Popham.

7. If A. being Leſſee for Years of the (h) Mowing of a Meadow, the Reverſion in Fee to B. and B. grants the Mowing to C. for a Month, to commence after the Expiration of the Term for Years of A. the Remainder after the Month ended to D. in Fee, it is a void Remainder to D. becauſe this Remainder being a Freehold, cannot commence at a Day to come, as it ought in this Caſe, if it be a good Remainder, for as much as it depends upon an Eſtate which is to commence at a Day to come, and prima facie it ſhall be intended that he who hath the Mowing hath the Soil alſo. Paſch. 10 Car. B. R. inter (i) Ward and Pettifer, per Curiam, reſolved on Evidence at the Bar, which concerned the Choriſters of Litchfield.

(h) In the Original it is Tonſure, and perhaps ſhould be engliſhed Moth of, &c.

(i) Cro. Car. 362. S. C. and S. P. appears therein.

8. If A. ſeiſed in Fee of one hundred Acres, makes a Feoffment of eighteen Acres of the hundred Acres, Habend. ſibi & hæredibus ſuis ad electionem ipſius B. & Hæredum ſuorum, which they pleaſed, (without (k) ſpecifying any particular Acres of the hundred Acres) it is a void Feoffment for the Incertainty, for a Livery cannot operate

(k) In the Original it is Deſigner.

rate in futuro, but ought to operate either at the Time of the Making, or nunquam (a). Dy. 11 El. 280. 17, 18, 19. adjudged. (a) 2 Rol. Abr. 11.

pl. 6. S. C. 1 And. 11. S. C. Bendl. 148. S. C. Moor 81. pl. 215. S. C. My ſecond Part 759. pl. 1. S. C.

9. If *A.* being Tenant for Life leaſes for four Years, and the Leſſee enters, and then *A.* grants (b) *tenementa præd'* to *B. habendum* from Midſummer next, for the Life of *A.* and after Midſummer the Leſſee attorns, this is a void Grant, for that an Eſtate of Freehold cannot commence *in futuro*, and (c) no expreſs Eſtate being limited in the Premiſſes, the *Habendum* cannot be ſaid to be contrary to it; and the Grant being void at the Beginning, the Attornment after Midſummer could not make it good, *quod initio non valet, &c. Mich.* 39 & 40 *Eliz.* (d) *Buckler's* Caſe, 2 *Co.* 55. adjudged.

(b) Where one in Reverſion grants the Reverſion habendum the ſaid Reverſion after the Death, Surrender, or Forfeiture of Tenant for Life, &c. and held good, being then to take Effect in Poſſeſſion. 2 Brownl. 299. and vid. Cro. El. 323. 1 And. 284, 289. (c) For this vid. 2 Rol. Abr. 65. pl. 2. (d) Cro. El. 450, 585. S. C. adjudged, 1 And. 29. S. C. adjudged, Moor 423. S. C. adjudged.

10. If the King grants for three Lives, *habendum a die confectionis literarum patentium*, this is void, becauſe an Eſtate of Freehold cannot commence *in futuro*, and Letters Patents under the Great Seal amount to a Livery; and if the Freehold ſhould paſs immediately from a Day to come, then the King would have a particular Intereſt in the mean Time without any Donor, which is againſt the Rules of Law. *Trin.* 39 *Eliz.* (e) *Barwick's* Caſe, 5 *Co.* 93. adjudged.

(e) Moor 393. pl. 509. S. C. adjudged.

11. If a Parſon demiſes his Tithes to the Owner of the Land, from which, *&c. habendum* from *Michaelmas* next, to him and his Heirs, during the Life of the Parſon, this is void; for tho' the Tithes are ſpiritual and cannot be extinct in the Land, yet in the Conveyance of them they ought to follow the Nature of the Land and other Hereditaments *in eſſe*, and cannot be granted for Life from a Day to come. *Trin.* 6 *Jac.* Between *Edmonds* and *Booth*, *Telv.* 131, 132. by *Fleming* Ch. Juſt. *Fenner* and *Williams* againſt *Telverton* and *Crook*, who held, that this Leaſe being only of the Tithes of the Leſſee's Land, it did not enure by Way of Intereſt, but Diſcharge; for a Man cannot have Tithes of his own Land, and a Diſcharge may well commence at a Day to come; but *Fleming* and *Williams* ſaid, being pleaded as a Leaſe, it muſt be ſo intended.

12. The King may grant an Eſtate in an Office to commence *in futuro*, or upon a Contingency, for he hath no Inheritance in the Office, or to the Execution of it, but in Point of Intereſt only to grant; and it was ſaid there was a Diverſity between Offices in Fee exiſting, and ſuch as were only granted for Life, which being as a new Thing created, might as a (f) Rent *de novo* be granted to commence *in futuro. Mich.* 5 *Will.* Between (g) the King and *Kemp*, 4 *Mod.* 275, 276. adjudged, the Grant being of a Searcher in the Port of *Plimouth*.

(f) For this vid. 8 H. 7. 2. b. 2 Vent. 204. 1 Co. 87. a. b. —— That a Rent de novo may be granted to one for Life, Remainder to another in Fee, vid. 2 Rol. Abr. 415. b. 2. with the Notes there. (g) Salk. 465. S. C. and per Curiam, tho' a Freehold cannot be granted to commence in futuro, yet a new Office, or a Rent de novo may, for it is a Creature of him that makes it, and the King doth not grant a Reverſion but in Reverſion. Salk. 446. S. C. adjudged, becauſe an Office in the Crown to grant, and not an Office of which there is any Eſtate in Fee in eſſe, but newly granted, and ſo may riſe and fall, and be in eſſe or not, as a Rent granted de novo, Carth. 350. S. C. adjudged, and tho' the Word Conceſſimus was omitted, yet there being the Word Aſſignavimus, it was ſaid to be more proper, becauſe not any Office in which the King had any Eſtate, as where an Office of Inheritance comes to the King by Forfeiture. Comb. 334, 335. adjudged, and a Diverſity taken between an Office once granted out in Fee, whereof there is an Inheritance exiſting, and ſuch as this which is only capable of being ſo granted, and vid. Cro. Car. 279.

(C) Where it may be moveable.

1. If there be eighty Acres of Meadow, which have been uſed from Time whereof, &c. to be divided between certain Perſons, and that a certain Number of Acres belonged to each of thoſe Perſons, as to A. thirteen Acres to be yearly aſſigned and allotted, ſo that ſometimes the thirteen Acres lay in one Place, and ſometimes in another Place, and ſo of the Reſidue; A. in this Caſe hath a (a) moveable Fee in thirteen Acres, and the Number only certain, but the Place where they lie yearly uncertain. Hill. 34 El. B. R. inter (b) Welden and Bridgwater adjudged; quod vide Co. Lit. 4. 48. a. b.

(a) And if the Owner of thoſe thirteen Acres grants a Rent-charge out of thoſe thirteen Acres lying in a Meadow of eighty Acres, without mentioning particularly where they lie; there, as the Eſtate in the Land removes, the Charge will remove alſo. Co. Lit. 343. b. —— If a Feoffment be made thereof, how Livery ſhall be made thereupon, vid. 2 Rol. Abr. 10. pl. 9, 10. (b) Cro. El. 421, 422. S. P. adjudged, Moor 302. pl. 453. not ſo fully reported.

(c) Co. Lit. 167. a. S. P. 180. a. S. P. Cro. El. 421, 422. S. P.

2. (c) If a Partition be made between two Coparceners, that one ſhall have certain Land from Eaſter till Lammas, to him and his Heirs, and the other ſhall have it from Lammas till Eaſter, to him and his Heirs; or the one ſhall have the firſt Year, and the other the ſecond Year alternis vicibus, in theſe Caſes ſeveral Perſons (d) have ſeveral Inheritances of the ſame Land at ſeveral Times. Co. Lit. 4.

(d) But 1 Co. 187. a. it was ſaid it was good as to the Poſſeſſion, but no Severance of the Inheritance.

3. If two Coparceners make Partition of two Manors, that the one ſhall have one Manor for one Year, and the other the other Manor for the ſame Year, and the ſecond Year each of them ſhall have that Manor which he had not the Year before, alternis vicibus imperpetuum, this is a moveable Fee. Co. Lit. 4. 48. b.

(D) What ſhall be an Intereſt and no Eſtate in Fee, &c. for Life or Years, &c.

(e) All. 45, 46, 47. S. P. cited, 1 Jon. 25. Godb. 103.

* Fol. 830.

1. (e) If A. (f) deviſeth his Land to B. by his Will in Writing, to his Executors, for Payment of his Debts, and until his Debts paid, in that Caſe the Executors have but a Chattel and an incertain Intereſt until the Debts paid; for if they ſhould have it for their Lives, then by their Death their Eſtate would ceaſe, and the Debts be unpaid; but being only a Chattel * it ſhall go to the Executors of the Executors for Payment of the Debts. Co. Lit. 42. Co. 8. Mat. Manning 96. Co. 4. Sir Andrew Corbet 82.

(f) But if ſuch Eſtate be made by Grant, 'tis a Freehold. 8 Co. 96. a. Co. Lit. 42. a. Cro. El. 315. this Diverſity, reſolved by Gaudy and Anderſon.

2. Guardians in Chivalry, who hold over for ſingle or double Value, have incertain Intereſts, and yet but Chattels. Co. Lit. 42.

3. Tenants by Statute-Merchant, Statute-Staple, and by Elegit, have incertain Intereſts in the Land, and yet they have but Chattels, and no

Freeholds whoſe Eſtates are created by ſeveral Acts of Parliament. *Co. Lit.* 42. *a.*

4. (a) If a Feoffment be made of Land (b) reſerving Rent, *&c.* upon Condition, that if it be behind, the Feoffor and his Heirs may enter and hold until ſatisfied or paid the Rent behind; if the Feoffor enters for Non-payment, the Feoffor ſhall hold the Land, and take the Profits untill he is ſatisfied, and then the Feoffee may re-enter, for the Feoffor has the Land but in Nature of (c) a Diſtreſs till ſatisfied, tho' he takes the Profits in the mean Time to his own Uſe (d). *Lit. Sect.* 327. and my Lord *Coke*, in his Comment thereupon, *Co Lit.* 202. *a.* ſays, the Feoffor by his Entry gains no Eſtate of Freehold, but an Intereſt by Agreement of the Parties to take the Profits in Nature of a Diſtreſs.

(a) Allen 45. S. P. cited and argued, it was but a Chattel. 1 Lev. 170. cited.

(b) So if one by Deed grants a Rent-charge, and if it be arrear, that the Grantee may enter and retain the Lands till paid. Jemot and Cooly, Raym. 135, 158. adjudged, 1 Sid. 223, 262, 344. adjudged; the Grant of the Rent being for Years provided, if it be in arrear, the Grantee and his Heirs may enter, and no Livery made thereupon; and ſaid, tho' the Common Law would not allow any ſuch uncertain Intereſt to ſtand of it ſelf, yet it would well allow it to wait on a certain fixed Eſtate. 1 Saund. 112. adjudged, 1 Lev. 170. And by three Judges, tho' the Power of Entry may be an Inheritance (I ſuppoſe it is intended where the Rent is in Fee) yet when the Entry is made, it is a Chattel Intereſt, which with the Arrears, will go to the Executors, and they ſhall only take the ordinary Profits, and cannot cut Trees or commit Waſte; and Twiſden ſaid, if it was not for the Words, till ſatisfied, it would be an Inheritance in the Land, to remain in the Heir as a Penalty; and it was ſaid by Moreton, that an Inheritanee in Land may be granted without Livery, as veſturam terræ, tho' not the Land it ſelf. (c) But yet he may leaſe for Years. Vid. 1 Roll. Abr. 846. pl. 6. (d) Raym. 137. It is ſaid by Kelynge Juſtice, that this Caſe cannot be maintained by Reaſon, but only by the Authority of the Author.

5. If there be a Deviſe to *A.* in Tail Male, Remainder, *&c.* provided, that if *A.* dies without Iſſue Male, but leaves Iſſue Female, then the Iſſue Female ſhall enter, and hold till he in Remainder pays every of them 400 *l.* and *A.* dies without Iſſue Male, leaving only one Daughter, who enters into the Land and dies. Between *Price* and *Vaughan*, *Trin.* 14 *Car. All.* 45. it ſeemed the better Opinion, that ſhe had a Chattel, which ſhould go to her Executors.

(E) In what Caſes an Eſtate ſhall be in a Perſon without Entry or Claim.

1. (e) IF a Man ſeiſed in Fee of Land (f) bargains and ſells it by Deed inrolled, and dies; the (g) Freehold is in the Bargainee before Entry or Claim, ſcilicet, a Freehold in Law, Mich. 13 Car. B. R. inter (h) Hiblyn and Slacke, per Curiam, reſolved on a Trial at Bar; and ſo they held in Caſe of a Deviſe.

(e) Co. Lit. 266. b. S. P. and vid. March 62, 63.

(f) So where Uſes are raiſed by Covenant upon a good Conſideration. Co. Lit. 266. b.

(g) So upon a Bargain and Sale of Lands for Years, the Poſſeſſion is in the Bargainee before Entry. My firſt Part 621. pl. 12. —— To attorn, aſſign, releaſe, but not to maintain Treſpaſs. Lutwich and Mitton, Cro. Jac. 604. 1 Jon. 7, 9. Cart. 66. All. 59. 2 Mod. 251. —— To grant, vid. my firſt Part 697. pl. 13. and Notes there.

(h) 2 Rol. Abr. 403. pl. 5. S. C.

2. If the Diſſeiſor dies ſeiſed, and the Lands deſcend to his Son, he hath the Freehold in Law in him before any Entry. *Litt. Sect.* 448.

3. If a Fine *Sur Conuſance de droit come ceo que il ad de ſon done*, or a Fine *Sur Conuſance de droit tantum* is levied to one, theſe are Feoffments of Record, and the Conuſee hath a Freehold (i) in Law in him before Entry. *Co. Lit.* 266. *b.*

(i) But not the actual Freehold. Cro. Jac. 604.

4. Upon an Exchange, the Parties have neither Freehold in Deed or Law before Entry. *Co. Lit.* 266. *b.*

5. So

5. So upon a Partition, the Freehold is not removed till Entry. *Co. Lit.* 266. *b.*

6. If Tenant for Life ſurrenders to him in Reverſion, he hath the Freehold in Law in him before Entry. *Co. Lit.* 266. *b.*

7. Upon a Livery within View no Freehold veſts before Entry. *Co. Lit.* 266. *b.*

8. If the Tenant in a *Precipe*, being ſeiſed of Lands in Fee, had confeſſed himſelf a Villein to a Stranger, and to hold the Land of him in Villeinage; by this Acknowledgment the Stranger had been actually ſeiſed of the Freehold and Inheritance without any Entry. *Co. Lit.* 266. *b.*

(a) Hob. 204. S. P. 3 Mod. 300.

9. (a) If an Eſtate be conveyed to a Feme Covert, it veſts in her preſently before any Agreement thereto by the Husband, ſubject to be diveſted by his Diſſent thereto. *Co. Lit.* 3. *a.* 356. *b.*

10. If *A.* diſſeiſes one to the Uſe of *B.* who knows nothing of it, and *B.* aſſents thereto, in this Caſe *A.* is Tenant of the Land till Agreement, and after *B.* is Tenant thereof. *Co. Lit.* 180. *b.*

(b) Godb. 9. S. P. Two Judges againſt Two.

11. (b) If there be Tenant in Tail, Remainder in Tail, *&c.* and Tenant in Tail in Poſſeſſion leaſes for three Lives, according to the Statute 32 *H.* 8. and afterwards dies without Iſſue, and he in Remainder before any Entry, levies a Fine, it is good; for by the Death of Tenant in Tail without Iſſue, the Freehold was veſted in him in Remainder in Tail. 20 *El.* 1 *Leon.* 268.

(c) So if Leſſee for Years aſſigns, the Aſſignee before Entry, or Waiver of the Poſſeſſion by Leſſee hath an actual Eſtate in him. 2 Rol. Abr. 495.

12. If Leſſee for Years (c) ſurrenders, to which the Leſſor agrees, the Poſſeſſion and Intereſt is in the Leſſor without Entry. *Hill.* 3 *Car.* Between (d) *Peto* and *Pemmerton*, *Hut.* 94. agreed *per Curiam.*

(d) Cro. Car. 101, 102. S. C. and S. P. agreed Hetl. 50, 71. S. C. Lit. Rep. 58, 82. S. C. but in theſe two laſt Books S. P. not expreſſed, but may be collected, and vid. 1 Vent. 205.

13. If Tenant for Life ſurrenders to him in Remainder, this will veſt the Eſtate in him before Notice or Agreement thereto, as the Grant of Goods made in the Abſence of the Grantee veſts the Property, and a Bond made to Obligee in his Abſence creates a Lien before Notice. *Hill.* 9 *Will.* Between (e) *Thompſon* and *Leech*, *Salk.* 618. *per Curiam.*

(e) By the Report of this Caſe in the ſeveral Books following, viz. 2 Vent. 199, &c. 208. 3 Levinz 284. 3 Mod. 296, 297, &c. it appears that the Tenant for Life continued in Poſſeſſion, and retained the Deed of Surrender, the Surrenderee knowing nothing of it, and therefore the firſt Judgment was given in B. R. by Pollexfen Chief Juſtice, Powel and Rokeby, that there was no Surrender until ſuch Time as the Surrenderee had Notice thereof; and agreed thereto, Ventris diſſentiente; and upon a Writ of Error this Judgment was after affirmed in B. R. per totam Curiam; but after upon a Writ of Error in Parliament reverſed; which warrants this Point laid down in Salkeld, tho' not as to its being held per Curiam, as ſaid there; eſpecially when it appears by the Report of this Caſe in Carth. 211, 250. that the Reverſal in Parliament was contrary to the Opinion of all the Judges Aſſiſtants, except Chief Baron Adkins; but there being another Action between the ſame Parties, the Judgment upon that was, for other Reaſons, upon a Writ of Error, affirmed in Parliament, tho' they would not admit this Point to be argued, as being before determined in Parliament. Vid. Comb. 438, 468. 3 Mod. 301, 302, &c. Caſes in Parliament 150, 151, &c.

(F) (a) What (b) ſhall be a ſufficient Poſſeſſion to leaſe, give, or enfeoff.

(a) What ſhall be a ſufficient Seiſin of a Thing to grant it. 2 Rol. Abr. 47.

1. If a Man leaſeth for Years, reſerving Rent to be paid at a Place out of the Land, on Condition for Non-payment, (c) that his Eſtate ſhall ceaſe, and the Leſſor demands the Rent at the Day and Place, and it is not paid, and the Leſſee continues Poſſeſſion afterwards; yet the Leſſor may leaſe it to another by Indenture (d) before any Re-entry, for the Leſſee by Continuance of Poſſeſſion was but Tenant at Sufferance. Hill. 32 El. B. R. inter (e) Germin and Willis, adjudged.

(b) Where one leaſes for Years, he cannot afterwards, before the Entry of the Leſſee, grant his Reverſion by the Name of a Reverſion. Co. Lit. 46. b. 5 Co. 125. Cro. Car. 110. but for this vid. 2 Rol. Abr. 462. A. 1. and the Notes there. (c) Otherways if the Condition had been, that the Leſſor might re-enter. Dy. 7. p. 6. for the Diverſity where the Condition of a Leaſe is, that it ſhall be void, and where that the Leſſor may re-enter. Vid. Co. Lit. 145. a. 4 Co. 64. b. Pl. Com. 136. (d) For the Leaſe is determined before any Entry. My ſecond Part 122. pl. 6. which vid. and the Notes there. (e) Cro. Eliz. 167. S. C. 2 Leon. 97. S. C. adjudged.

2. If a Man be diſſeiſed, he cannot (f) leaſe it for Years to another before Re-entry.

(f) Or put into the Common, or licence another to put in. Co. Lit. 122. b. 3 Leon. 144.

3. So (g) the Diſſeiſee cannot ſeal and deliver a Deed of (h) Leaſe, and give Power to another to enter into the Land, and deliver the Land to the Leſſee to make it a good Leaſe, for at the Time of Sealing and Delivery he had not Power to contract for the Land, having but a Right. Hill. 32 El. B. R. inter (i) Germin and Willis, agreed.

(g) Stephens and Elliot, S. P. Cro. El. 483. and vid. Dal. 81. (h) This muſt be intended of a Leaſe for Years, which takes Effect by the Delivery of the Deed. Co. Lit. 48. b. (i) Cro. El. 167. S. C. but S. P. does not appear to be agreed. 2 Leon. 297. S. C. but S. P. does not therein appear to have been agreed.

4. (k) If a Corporation be diſſeiſed, and afterwards ſeal a Deed of Leaſe, and make a Letter of Attorney to J. S. to enter into the Land, and deliver it as their Deed, and he doth it accordingly; yet it is not a good Leaſe, (l) for there needs not any Delivery of a Deed of a Corporation, but the firing their Seal makes it a perfect Deed, and they cannot ſtay the Perfection of the Deed by the Warrant of Attorney, to deliver it as their Deed, and they might have made the Letter of Attorney to ſeal and deliver it as their Deed. Contra Hill. 32 El. B. R. inter (m) Germin and Willis, per Curiam.

(k) Haywood and Fulcre, S. P. 1 Jon. 166, 170. Palm. 490, 498. and vid. 3 Keb. 307. (l) 2 Rol. Abr. 23. I. 4, 5. (m) Cro. El. 167. S. C.

5. (n) If a Diſſeiſee deliver out of the Land a Deed of Leaſe to a Stranger as an Eſcrow, and commands him to enter into the Land, and to deliver it on the Land as his Deed to the Leſſee, who doth it accordingly, it is a good Leaſe. Co. 3. (o) Jennings's Caſe, 35. b. adjudged.

(n) Co. Lit. 48. b. S. P. (o) Cro. El. 446, 447. S. C. adjourned, but Anderſon ſaid, it was a good Leaſe, becauſe it was not his Deed till the ſecond Delivery.

6. So he may make a Leaſe, and command another by Parol to enter, and ſeal and deliver the Leaſe, it is good without any Warrant of Attorney. Trin. 7 Jac. B. R. inter Maſon and Street, per Curiam.

7. If a Man be diſſeiſed and makes a Deed of Feoffment and Letter of Attorney to enter and take Poſſeſſion, and after to make Livery *ſecundum formam Chartæ*, which is done; this is a good Feoffment, tho' he was out

of Poſſeſſion when the Charter was made, for the Eſtate paſſes by the Livery. *Co. Lit.* 38. *b.*

8. If one leaſes to *J. S.* for Years, to begin from the End of a former Leaſe for Years then in Being, and after the End of that Leaſe, a Stranger enters by Wrong, (a) yet *J. S.* may grant over his Term. *Paſch.* 25 *El.* Between *Bruerton* and *Raynsford*, *Cro. El.* 15. agreed *per Curiam.*

(a) But by Saffin's Caſe, 5 Co. 125. 2 Cro. 60. it ſeems otherways, for that the Leaſe being begun, he had an Eſtate which might be devested.

9. (b) But if *J. S.* had entered, and afterwards been put out, he could not before Re-entry have granted over his Term. *Paſch.* 25 *El.* in the Caſe of *Bruerton* and *Raynsford*, *Cro. El.* 117. agreed *per Curiam.*

(b) Cro. Jac. 60. S. P. agreed per Curiam.

10. If one leaſes to *J. S.* to begin two Years after, and the Leſſor continues the Poſſeſſion after the two Years expired, yet *J. S.* before Entry, may grant over his Term. *Hill.* 31 *El.* between *Wheeler* and *Thoroughgood*, *Cro. El.* 127. *per Curiam.*

11. If *B.* Leſſee for Years of the King, be ouſted by a Stranger, tho' he be out of Poſſeſſion, yet he may aſſign over his Term, for the Reverſion being in the King he, cannot be out of Poſſeſſion, but at his own Pleaſure. *Hill.* 34 *El.* between *Wingate* and *Morke*, *Cro. El.* 275. ruled upon Evidence.

12. If *B.* Leſſee for Years, after his Term expired, takes a new Leaſe for Years from a Stranger, rendring Rent, and after continues the Poſſeſſion, and pays the Rent to the Stranger; yet the firſt Leſſor, before any Entry by him, may leaſe to another, for that *B.* remains Tenant at Sufferance to his firſt Leſſor. Between *Preſton* and *Love*, *Noy* 120. adjudged.

13. If one intrudes upon the Lands of the King, and the King grants them to *J. S.* the Patentee before Entry may grant the ſame over, notwithſtanding the Poſſeſſion of the Intruder, (c) for he could not be a Diſſeiſor by his bare Continuance of the Poſſeſſion. *Trin.* 30 *El.* between (d) *Berry* and *Goodman*, 2 *Leon.* 147.

(c) My 2d Part 625. pl. 10.

(d) Ow. 95, 96. S. C.

14. If one leaſes for Years, to commence at a future Day, and before the Day the Leſſor is diſſeiſed, yet the Leſſee may grant over his Intereſt, for that it could not by Diſſeiſin or Feoffment be deveſted and put to a Right any more than a Rent, Common, *&c. Paſch.* 3 *Jac.* in *Saffin's* Caſe, 5 *Co.* 124. *a.* admitted *per Curiam.*

15. If *A.* leaſes Lands to *B.* at Will, who leaſes the ſame to *C.* for Years, and *C.* enters, and then *A.* and *B.* join in a Fine, and declare the Uſes thereof, this is good; the Leaſe for Years made by Tenant at Will being no Diſſeiſin, but at the Election of the Leſſor at Will. 9 *Car.* between (e) *Blunden* and *Baugh*, *Cro. Car.* 302, 303. The Judgment given in *B.* by three Judges againſt one, reverſed, and the rather for the great Miſchief which would enſue; if one who hath a Tenant at Will that leaſes for a ſhort Time, and the firſt Leſſor not knowing thereof levies a Fine for the Jointure of his Wife, or other Purpoſes, and it ſhould be taken as a Fine by a Diſſeiſee, and ſo enure to the Benefit of the Leſſee for Years.

(e) 1 Jon. 315, 316. S. C. Lit. Rep. 297, 390. S. C. My ſecond Part 629. pl. 2. S. C. Vide, and Notes there.

16. (f) If upon a Statute the Lands of the Conuſor are extended and delivered to the Conuſee upon a *Liberate*, and after the Conuſor being in Poſſeſſion continues it; the Conuſee cannot aſſign his Intereſt, for tho' by the Delivery upon the *Liberate* he had the actual Poſſeſſion, and by the Return thereof he is eſtopped to ſay otherwiſe, yet by the Continuance of the Poſſeſſion by the Conuſor, the Eſtate of the Conuſee was turned to a Right, as the Continuance of the Poſſeſſion by the Diſſeiſor, after Claim made by the Diſſeiſee, makes a Diſſeiſin; and this is not like the Caſe of a Mortgagor who continues the Poſſeſſion (g) by Conſent, and not in Oppoſition to the Mortgagee. *Trin.* 3 *Will. & Mar.* between (h) *Hammond* and *Wood*, *Salk.* 563. adjudged.

(f) Stephens and Hanham, S. P. 1 Lev. 312. adjudged.

(g) For this vid. 1 Rol. Abr. 859. pl. 12. and the Notes there.

(h) Hannam and Woodford, S. C. Skin. 300. adjudged, 4 Mod. 483. 3 Lev. 312. cited.

(G) In what (a) Caſes an Eſtate ſhall be ſaid to be ended and void without Entry or other Act, and where not.

(a) There is a Diverſity betweena Condition which requires a Re-entry and a Limitation, that *ipſo facto* determines the Eſtate without any Entry. Co. Lit 214. b. 2 Co. 53. * Fol. 831. Moor 292. 3 Leon. 153. 2 Mod. 7. Cart. 171. 2 Rol. Rep. 422. 2 And. 8, 9. 2 Brownl. 68, 69.

1. IF the Huſband ſeiſed in Fee in the Right of his Wife, hath Iſſue by the Wife, and afterwards makes a Leaſe for Years reſerving Rent, and afterwards the Wife dies, and afterwards the Huſband dies before the End of the Years; (b) yet it is void and ended in Law before any Entry of the next Heir of the Wife, foraſmuch as he cannot * make it good by any Acceptance of Rent, the Leaſe being made (c) only by the Huſband. Hill. 10 Car. B. R. inter (d) Miller and Manwaring, per Curiam; adjudged in a Writ of Error on a Judgment at Cheſter, which concern'd Sir Randal Crewe. Intratur Trin. 10 Car. Rot. 321.

(b) Pl. Com. 137. b. *vid.* Cro. Jac. 332. 1 Leon. 122. 13 Co. 49. (c) It ſeems otherways where made by both. My firſt Part 714. Y. 3. which *vid.* with the Notes there, and *vide* 2 Rol. Abr. 89. pl. 6. (d) Cro. Car. 397, 398. S. C. adjudged, 1 Jon. 354. S. C. adjudged.

2. If Tenant in Tail leaſeth for forty Years, rendring Rent, to commence ten Years afterwards, and dies, the Iſſue enters and enfeoffs A. the ten Years expire, the Leſſee enters; if A. accepts the Rent, the Leaſe is made good, for he ſhall have the ſame Election that the Iſſue had; for the Entry and Feoffment of the Iſſue before the Commencement of the Leaſe hath not made it void. (e) Co. Lit. 46. b. Com. 437.

(e) 1 Rol. Abr. 842. H. 4. S. C. *vid.* and Notes there.

3. (f) If a Prebendary, Parſon, or Vicar, leaſe for Years, not according to the Statute, it is void by his Death before the Entry of the Succeſſor. Co. Lit. 45. b.

(f) Br. Dean and Chapter 20. Br. Acceptance 9. and *vid.* Hetl. 88. Dyer 239. b. Poph. 120. Bridg. 94.

4. (g) But otherwiſe of a Leaſe for Life. Co. Lit. 45. b. (h) for that is only voidable for the Livery by which it was created.

(g) Br. Dean and Chapter 20. but for this Diverſity between a Leaſe for Life and for Years made by a Parſon, *vid.* 3 Co. 65. a. and my ſecond Part 130. C. 4. and the Notes there. (h) Godb. 9.

5. (i) Regularly, when a Man will take Advantage of a Condition, he muſt enter if he may, and when (k) he cannot enter, muſt make a Claim, becauſe a (l) Freehold and Inheritance cannot ceaſe without Entry or Claim. *Co. Lit.* 218. *a.*

(i) 1 Rep. 94. b. Moor 345, 346. 2 And. 8, 9. (k) When from the Nature of the Thing granted, as a Reverſion, Remainder, Rent, Common, &c. but otherways in many Caſes, where he cannot enter, being in Poſſeſſion, he need make no Claim, vid. infra. (l) But a Leaſe for Years may be made void without any Entry or Claim; and as it may begin, ſo it may end without any Ceremony; as if a Leaſe for Years be made upon Condition to be void, if, &c. Co. Lit. 214. b.

6. As if *A.* grants an Advowſon to *B.* and his Heirs, on Condition, that if *A.* pays, *&c.* 20 *l.* ſuch a Day, *&c.* the State of *B.* ſhall ceaſe, and *A.* pays the Money; yet the Eſtate is not reveſted in him before a Claim, which muſt be at the Church. *Co. Lit.* 218. *a.*

7. (m) If *A.* bargains and ſells Lands to *B.* by Deed indented and inrolled, with a *Proviſo*, that if *A.* pays, *&c.* the Eſtate ſhall ceaſe, and he

(m) 6 Co. 34. a. S. P. for tho' Uſes at Common Law might have ceaſed without Claim, yet now being transferred to the Poſſeſſion, they purſue the Reaſon of the Common Law as to Ceſſer, &c. 2 And. 75, 76.

pays

pays the Money, yet the Eſtate is not reveſted in him before Re-entry. *Co. Lit.* 218. *a.*

(a) 2 Co. 53. b. 8. So if a Man grants, or (a) bargains and ſells a Reverſion, Remainder, Rent, Common, *&c.* upon Condition, there muſt be a Claim before the Eſtate can be reveſted by Force of the Condition, and that made upon the Land. *Co. Lit.* 218. *a.*

9. But if one grants a Rent-charge in Fee out of his Lands on Condition, if the Condition be broke, the Rent ſhall be extinct; becauſe being in Poſſeſſion, he need make no Claim upon the Land, and therefore the Law will adjudge the Rent void without it. *Co. Lit.* 218. *a.*

(b) 1 Co. 174. a. S. P. 10. (b) If *A.* enfeoffs *B.* on Condition that *B.* pays him 20 *l.* at a Day, and before the Day *B.* lets the Land to *A.* for Years, and fails in Payment, *A.* ſhall retain the Land to him and his Heirs; for being in Poſſeſſion, he could not enter, and need not claim. *Co. Lit.* 218. *a. b.*

(c) Co. Lit. 237. a. and vid. 1 Co. 174. a. Moor 605. 11. (c) If one covenants to ſtand ſeiſed to the Uſe of himſelf for Life, Remainder to his firſt and other Sons in Tail ſucceſſively, with a *Proviſo* of Revocation, and after the Father revokes, according to his Power, the whole Eſtate is preſently reveſted in him without Entry or Claim, being before in Poſſeſſion, ſo that he could not enter. *Co. Lit.* 218. *b.*

(d) Co. Lit. 202. b. 8 Co. 44. a. but for this vid. my 2d Part 124. pl. 10. 12. If before 32 *H.* 8. the Husband ſeiſed in Fee in the Right of his Wife, had made a Feoffment upon Condition, and died, and after the Heir of the Husband had entered for Breach of the Condition, by which the Diſcontinuance was defeated; the Eſtate of the Heir had (d) preſently vaniſhed, and the Eſtate veſted in the Wife and her Heirs, without any Entry or Claim by her or them. *Co. Lit.* 336. *b.*

(e) What ſhall be a Limitation to determine an Eſtate, and what a Condition, vide my 2d Part 9.

(e) *Limitation of Eſtates in Law.*

(H) What ſhall be a Determination on a Limitation in Law.

1. IF A. poſſeſſed of a Term for Years, deviſeth it to B. and to the Heirs Male of his Body begotten, and afterwards B. dies without Iſſue Male, within the Term, yet his Executors ſhall have the Reſidue of the Term, and not the Executors of A. for it is a void Limitation of the Grant to limit to B. and the Heirs Male of his Body, for his Heir Male of his Body could not have it if he had had any Iſſue Male, but his Executors, becauſe an (f) Intail cannot be of a Term, and then it is a Deviſe of the Term abſolutely without any Limitation, and ſo the Executors of the Deviſee ſhall have it, and there ſhall not be any Reverter to the Executors of A. the Deviſor on the Death of the Deviſee without Iſſue Male. Paſch. 11 Car. B. R. inter (g) Leventhorpe and Aſhbie, reſolved per Curiam, on Evidence at the Bar. And they would not ſuffer it to be found Specially for the Clearneſs, becauſe they ſaid it had been ſo adjudged ſeveral Times. Intratur Mich. 10 Car. Rot. 120. on the Will of Thomas Leventhorpe.

(f) My ſecond Part 794. vid. and the Notes there.

(g) My ſecond Part 521. L. 1. S. C. which vid. with Notes there.

2. If A. ſeiſed in Fee of Land deviſeth it to J. S. and the Heirs Male of his Body begotten, from his Death, for Five hundred Years, it is an Eſtate for Five hundred Years, determinable on his Death, without Iſſue Male, by Way of Limitation; but his

Executors ſhall have it, and not his Iſſue Male. Co. 10. (a) Leonard Lovie's Caſe 87.

(a) My ſecond Part 794. H. 1. S. C. vid. and the Notes there. 2 Rol. Rep. 424. S. C. cited, 1 Roll. Abr. 847. H. 2.

3. (b) If there be two Jointenants for Life, and one leaſeth for Years his Part, the other Jointenant ſurrenders his Part, and afterwards he who made the Leaſe for Years dies, the Leaſe for Years is determined, altho' at the Creation of the Leaſe for Years it was determinable on the Death of both Jointenants; for the Limitation of the Leaſe for Years depends on the Limitation of the Eſtate for Life, and therefore the Survivor of the Eſtate for Life being determined by the Surrender, the Survivor of the Leaſe for Years is alſo determined by a Conſequence. Hill. 13 Jac. B. R. inter (c) Daniel and Waddington adjudged.

(b) Harbin and Loby, Noy 157, 158. adjudged, and vid. S. C. Moor 395. pl. 514. Poph. 96.

(c) Cro. Jac. 377. S. C. adjudged; 3 Bulſt. 130. S. C. adjudged, 1 Rol. Rep. 309. S. C. adjudged.

4. (d) If a Man poſſeſſed of a Leaſe for Years of Land deviſeth the Land to another generally, the Deviſee ſhall have the whole Term without any Limitation to determine on his Death. Mich. 13 Jac. B. R. per Curiam.

(d) Dyer 307. pl. 69. S. P. and vid. 1 Rol. Rep. 249, 250, 370. 3 Bulſt. 123. 1 Mod. 54. 1 Sid. 451. 2 Sid. 151.

5. If a Man poſſeſſed of a Leaſe for Years of Land grants a Rent out of the Land to another generally, without limiting any Eſtate, it ſhall be during the whole Term, and not (e) determinable by the Death of the Grantee. Mich. (f) 13 Jac. B. R. held.

(e) As it would be if granted for the Life of the Grantee. 7 Co. 23. Cro. El. 183. (f) Goff and Haywood ſeems to be S. C. which vid. 1 Rol. Rep. 247, 248, 368, 369. 3 Bulſt. 121, &c. Bridg. 52, 53, &c. but that was upon a Deviſe.

* 6. (g) If a Man grants Land to another, habendum to him and A. Uxori ejus, & uni Filiorum of him and A. ſecundum conſuetudinem Manerii, it being void to A. and their Sons, for the Incertainty which of them ſhall firſt take, it ſhall not be an Eſtate to the Grantee for his Life and the Lives of the other Two, for it was not the Intent of the Grantor to make them to be the Limitation of the Eſtate of the firſt Man, but that they ſhould take alſo for their Lives. Mich. 11 Jac. B. R. inter Cobb and Betterton, per Curiam.

* Fol. 832.

(g) Winſmore and Hubbard L. P. Godb. 51, 52. Palm. 32. cited, 4 Leon. 246. cited, Cro. El. 57. Hob. 313. and vid. 2 Leon. 1.

7. If one makes a Leaſe for twenty-one Years, if the Leſſee lives ſo long, and continues in the Service of the Leſſor, and the Leſſor dies, yet the Leaſe is not determined; for there was no Laches in the Leſſee, and it is by the Act of God that he can ſerve no longer. *Mich.* 40 *El.* between *Wrenford* and *Gyles*, *Cro. El.* 643. Adjudged by *Anderſon*, *Owen* and *Glanvill*, but *Walmſely* was ſtrongly againſt it; for that it is a Limitation to the Eſtate, that it ſhall not continue longer than he ſerves.

8. (h) If a Leaſe be made to *A.* and his Aſſigns, *habendum* to him during his own Life, and the Lives of *B.* and *C.* this is a good Limitation; and where it was objected, that if a Man hath two Eſtates in him, the greater will drown the Leſs, and that an Eſtate for his own Life is an higher Eſtate than for the Lives of others, and therefore they were not conſiſtent; it was anſwered and reſolved, that the Leſſee had but one Eſtate which had this Limitation, *viz.* during his own Life, and the Lives of the other Two. *Mich.* 41 *El.* (i) *Roſs*'s Caſe, 5 *Co.* 13. *a.* adjudged.

(h) Co. Lit. 41. b. Cro. El. 182. S. P. per Cur. and vid. Cro. El. 58. Moor 8. pl. 32. 2 Leon. 1. 1 Bulſt. 136. Cro. Jac. 282. Cart. 47. (i) Cro. El. 491. S. C. adjudged, Moor 398. pl. 521. S. C. adjudged, Goulſ. 157, 158. S. C. adjudged.

(a) So it ſeems where he grants it. 7 Co. 23. (b) But if deviſed to A. for Life, and after to B. generally, and they both die, the Executor of B. ſhall have it. Rawling and Rawling, Hetl. 163. Lit. 348. and vid. 1 Mod. 542. Sid. 651.

9. If one poſſeſſed of a Term for ninety-nine Years, (a) deviſes it to *A.* for Life, and ſo to *B.* and five others ſucceſſively, for (b) their Lives; if they all die, the Executor of the Teſtator ſhall have the Reſidue of the Term, for the Teſtator gave but a limited Eſtate, and what he gave not away muſt remain in him. *Hill.* 9 *Will.* between *Eyres* and *Falkland*, *Salk.* 231. adjudged.

(I) What ſhall be a Determination of the Eſtate on an Act or (c) Limitation.

(c) Muſt be taken ſtrictly. 1 Brownl 39.

(d) 2 Vent. 74. L. P. adjudged, and vid. 3 Bulſt. 132. 2 Brownl. 292.

1. (d) If a Man leaſeth Land for Years, if he and J. S. a Stranger, ſo long live, or if two Strangers ſo long live; by the Death of any of them the Eſtate is ended, becauſe the (e) Limitation is collateral to the Eſtate, for the Life of a Man is collateral to a Chattel, and therefore that Limitation is all one as if it had been, if both together ſo long live. Co. 5. Brudnell 9. b. reſolved Hill. 13 Jac. B. R. b. agreed.

(e) So if the Condition of a Bond be to to pay Money during two Lives, and one dies, the Payment ſhall ceaſe. 1 Mod. 187. and vid. 1 Rol. Rep. 197. —— But if the Baron leaſes for Years, reſerving Rent during his own Life and the Life of his Wife, this ſhall continue during the Life of the Survivor. Moor 876. pl. 1225. 1 Brownl. 30, 39. 1 Vent. 163. but vid. Latch 162.

(f) Hughs and Crowther L. P. 13 Co. 66. adjudged, 1 Brownl. 180.

2. (f) If there be two Jointenants for Life, and one leaſeth for Years, if he and his Companion ſo long live, and afterwards dies, it ſhall determine by his Death, becauſe the Limitation is collateral to the Eſtate, altho' the Eſtate had not been determin'd by his Death by the Limitation of the Law without that expreſs Limitation. Hill. 13 Jac. B. R. inter (g) Daniel and Waddington, adjudged.

(g) Cro. Jac. 377. S. C. adjudged, 3 Bulſt. 130. S. C. adjudged, 1 Rol. Rep. 309, 310, &c. S. C. adjudged, 2 Vent. 74. S. C. cited.

3. If a Woman be a Copyholder for Life, during her Widowhood, according to the Cuſtom of the Manor, and ſhe takes J. S. to Husband, ſhe being Niece to a former Wife of J. S. upon which J. S. is queſtion'd for an inceſtuous Marriage, and put to Penance by the High Commiſſion Court, and bound not to keep her Company, and afterwards J. S. dies, this Marriage doth not determine her Eſtate, for ſhe was not divorced a vinculo Matrimonii, albeit there was Cauſe for it. Hobart's Reports (h) 245. cited. Paſch. 16 Jac. on Evidence, Renington's Caſe, per Curiam.

(h) This Caſe is tranſlated as in Roll, but is not rightly ſtated from Hobart, ſhe claiming as Widow to J. S. who was guilty of the inceſtuous Marriage. Vid. Hob. 181. S. C. Noy 29. S. C. adjudged, Vaugh. 249, 322. S. C. cited.

4. If one makes a Feoffment to the Uſe of himſelf for his Life, and after his Death to the Uſe of *A.* his intended Wife, *during and until* ſome Son of them ſhall attain twenty-one, and afterwards to the Uſe of *A.* ſo long as ſhe continues a Widow, and they after marry, and the Husband dies without having any Iſſue, the Wife may enter. *Paſch.* 13 *El.* (i) *Dyer*

(i) Cochet and Sheldon S. C. Moor 15. pl. 6. adjudged the Wife had an Eſtate for Life before any Iſſue had, and if no Iſſue was had; tho' if there had been any Iſſue Male that had attained twenty-one, her Eſtate had been abridged. 1 And. 19, 20. agreed ſhe had a Freehold before any Iſſue, and it was no Matter whether ſhe had any Iſſue or not, for the Words, After his Death to the Uſe of A. gave her an Eſtate for Life, notwithſtanding the ſubſequent Words. Dal. 203, 204. adjudged, 1 Leon. 197. S. C. cited, and ſaid by Serjeant Owen arguendo, that if this Uſe had been raiſed by Covenant to ſtand ſeiſed, it would have been otherwiſe.

300. *pl.* 39. Adjudged by *Weſton*, *Harper* and *Dyer*; but ſaid a Writ of Error was after brought on this Judgment.

5. If a Feoffment be made to one and his Heirs *donec & quouſq*; *J. S.* pays the Feoffee, or his Heirs, 1000 *l.* and *J. S.* dies before any Payment made, the Feoffee and his Heirs ſhall have the Lands abſolutely for ever. *Dyer* 300. *pl.* 39. by three Judges.

6. If a Man leaſes to Two for Years, (a) provided that if the Leſſees die during the Term, the Leſſor ſhall re-enter, and one Leſſee aliens his Part and dies; yet the Leſſor cannot re-enter, but the Aſſignee ſhall enjoy the Term ſo long as the Survivor liveth, becauſe the Leaſe by the *Proviſo* is not to ceaſe till both are dead. *Co. Lit.* 219. *b.*

(a) But if a Leaſe for Years be made to Two, if they ſhall ſo long live; by the Death of one of them the Leaſe is determined. Hughs and Crowther, 13 Co. 66. 1 Brownl. 180. and vid. 2 Vent. 74.

7. If a Leaſe be made to *A.* during the Lives of *B.* and *C.* (not ſaying, or the Survivor of them), this by Conſtruction of Law is during the Life of the Survivor of them, and by the Death of one of them the Leaſe is not determined; as if a Leaſe is made to *A.* and *B.* and they aſſign to *C.* he hath an Eſtate during both their Lives, and the Life of the Survivor. (b) *Brudenell's* Caſe, 5 *Co.* 9. *b.*

(b) 13 Co. S. C. cited and affirmed to be Law, but vid. 3 Leon. 103. 1 And. 162. 1 Brownl. 30.

8. But there is a Diverſity between a Limitation of an Eſtate of Freehold during Lives, which is the uſual and ordinary Limitation thereof, and a collateral Determination thereof; as if limited during the Time that *A.* and *B.* ſhall be of the *Temple*, or during the Time they ſhall be Juſtices of Peace, *&c.* for in theſe Caſes the Failure of either determines the Eſtate. 5 *Co.* 9. *b.*

9. If Land is given to *A.* and his Heirs, ſo long as *B.* hath Iſſue Male, and *B.* dies, his Wife being big with a Son, who is after-born, yet the Eſtate is determined. *Noy* 132. reſolved.

10. *Voſcius* had a Penſion from the States, but upon their Diſpleaſure his Imployment and Penſion were taken from him and given to another, and thereupon he voluntarily left *Holland* and came into *England*, and after a War being broke out between the *Engliſh* and *Dutch*, one by Will deviſed Land to *Voſcius* during his Exile; and if it ſhould pleaſe God to reſtore him to his Country, or if he died, then he deviſed them to another; and after a Peace being concluded, ſo that *Voſcius* might have returned home, though not had his Penſion again. *Paſch.* 29 *Car.* 2. between (c) *Paget* and *Voſcius*, 2 *Levintz* 191, 192. adjudged *per totam Curiam*, that the Eſtate of *Voſcius* was not determined, becauſe the Exile, which ſeems to be intended, was his leaving his Country by Reaſon of the Diſpleaſure of the States, and the Subduction of his Penſion, in which there was no Alteration ſince the Making the Will.

(c) 1 Vent. 325. S. C. adjudged, 2 Jon. 73. S. C. adjudged, 2 Mod. 223.

S. C. adjudged; and in this Caſe it appears, that Voſcius, by the King's Grant, was enabled to take. 3 Keb. 638, 749. S. C. adjudged.

11. If one deviſes Lands to *A.* and the Heirs Male of her Body, upon Condition, and provided that ſhe marries and hath Iſſue Male by one ſurnamed *Searl*; and in Default of both, to *B. &c.* if *A.* marries one that is not a *Searl*, yet her Eſtate is not determined, becauſe ſhe may ſurvive her Husband, and after marry a *Searl*. *Trin.* 3 *Ann. Salk.* 570. adjudged.

Eſtate

Eſtate Fee.

(K) By what Words.

1. (a) IF a Man gives Land to another and his Heir, it is a Fee in the Donee, for the Word (c) Heir eſt nomen collectivum, and extends (d) to the Heir in infinitum. Hill. 37 El. B. R. (e) in Clarke and Day's Caſe, per Popham and Fenner.

(a) For many Inſtances where an Eſtate in Fee may be created without the Word Heirs, vid. Co. Lit. 9. b. 16. a. —— Where by Bargain and Sale before the Statute of Uſes, the Fee paſſed without the Word Heirs, vid. 1 And. 35. N. Bend 16. pl. 19. (c) My ſecond Part 556. pl. 4. (d) By Co. Lit. 8. b. the Donee hath but an Eſtate for Life, becauſe his Heir being but one, cannot take by Diſcent, and therefore ſhall have nothing; but yet for the contrary, vid. Godb. 155. and vid. my ſecond Part 556. pl. 4. and vid. Vent. 215. 3 Keb. 43, 53. Skin. 563. Hetl. 76. 1 Bulſt. 221, 222. Ow. 148, 149. (e) Moor 593. pl. 803. S. C. but S. P. does not appear. Cro. El. 313, 314. S. C. 2 Roll. Abr. 417. pl. 7. S. C. 1 Vent. 226. S. C. cited, Fitzg. 24, 25. S. C. cited.

(*) But Q.

2. The ſame Law would be of a Deviſe in ſuch Manner, (*) as was held by them.

3. Where after the Death of the Father Lands are granted to his eldeſt Son, and to the Heirs of the Father, the Son hath a Fee-ſimple. *Co. Lit.* 220. *b.*

(f) 2 Inſt. 336. S. P.

4. (f) If one at this Day grants Lands to *J. S.* and his Succeſſors, he ſhall have them but for Life, for the Word *Heirs* only makes an Eſtate of Inheritance in all Feoffments and Grants. *Co. Lit.* 8. *b.* and yet if it be an antient Grant, it ought to be expounded as the Law was at the Time of the Making thereof.

By what Words.

(L) What ſhall be ſaid a Fee by Implication in Reſpect of the Perſon to whom it is given, without expreſs Limitation.

(g) Fitz. Feoffments & Faits. 42. S. C. Br. Grant 115. S. C. and vid. 1 Rol. Rep. 370, 371.

1. IF Land be given to an Abbot and Convent, without ſpeaking of Succeſſors, yet it is a Fee. (g) 11 H. 4. 84. b. Curia. Contra Co. Lit. 94. b.

(h) Co. Lit. 8. b. S. P.

2. (h) If Land be given to a ſole Corporation, as a Biſhop, Parſon, Vicar, or ſuch like, he hath not a Fee, if it be not given to him and his Succeſſors. Co. Lit. 94. b.

(i) But by Co. Lit. 94. b.

3. But if Land be given to a Corporation (i) aggregate, they have a Fee, without naming of Succeſſors, becauſe this Body, to which the Grant * is made, never dies, as a Dean and Chapter, and (k) ſuch like. Co. Lit. 94. b.

* Fol. 833.

there is a Diverſity when the Head and Body are both capable, and when one is capable only, &c. (k) As Mayor and Commonalty. Dav. 46. and vid. Godb. 293.

4. If a Grant be made to the Church of ſuch a Place, it ſhall be a Fee in the Parſon and his Succeſſors. (a) 11 H. 4. 84. b.

(a) Fitz. Feoffments & Faits 42. S. C. Br. Eſtates 49. S. C.

5. If Land be given to a ſole Corporation, as to a Biſhop, Parſon, Vicar, or ſuch like, in Frankalmoigne, without naming of Succeſſors, yet a Fee paſſeth thereby, becauſe it hath been ſo allowed in ſuch antient Grants. Co. Lit. 94. b.

6. (b) If Land be given to an Abbot in Frankalmoigne, it is a Fee without the Words Succeſſors. (c) 2 H. 6. 36. b.

(b) Co. Lit. 94. b.

(c) I take this to be miſ-printed, there not being ſo many Folio's in that Year, and I ſuppoſe the Citation intended was the 20 H. 6. 36. b.

7. If the Father enfeoff the Son in Fee, and afterwards the Son ſays to the Father, whereas you have given me that Land, as full as you have given it me, (d) you keep it in you, upon which the Father enters into the Land, it ſeems no Eſtate in Fee ſhall paſs to the Father for Want of the Word Heirs. Contra (e) 39 Aſſ. pl. 12. adjudged. But quære.

(d) Ceo vouch ſave en vous in the Original.

(e) Fitz. Feoffment 88. S. C. but vid. Co. Lit. 9. b.

8. (f) If an Eſtate in Remainder be limited to the right Heirs of J. S. it is a Fee, although he doth not ſay, & hæredibus ſuis. 20 H. 6. 36. b.

(f) Co. Lit. 10. a. S. P. for being plurally limited, it includeth a Fee-ſimple, tho' it reſteth but in one by Purchaſe.

9. (g) If one gives Lands to the King by Deed inrolled, a Fee-ſimple paſſes without the Words *Succeſſors* or *Heirs*, becauſe in Judgment of Law the King never dies. *Co. Lit.* 9. b.

(g) 6 Co. 27. a. S. P.

(M) By what Words.

1. (h) If an Eſtate be made to Two & Hæredibus, without ſaying ſuis, it is not any Fee, but only for Life, for the Uncertainty, whether he intended the Heirs of both of them, of one of them, or of a Stranger. (i) 19 H. 6. 73. b. 20 H. (k) 1. 35. b.

(h) Co. Lit. 8. b. S. P. 1 Co. 85. a. S. P. vid. Hob. 174.

(i) Fitz. Feoffments & Faits 8. S. C. Br. Eſtates 18. S. C.

(k) This is ſo printed in the Original, but I ſuppoſe ſhould be H. 6. 35. b.

2. (l) The ſame Law would be altho' a Clauſe of Warranty be contained in the Deed to them & Hæredibus ſuis, for the Warranty cannot inlarge the Eſtate, nor doth it ſufficiently ſhew the Intent of the Grant. (m) 19 H. 6. 74. 20 H. 6. 35. b. 36.

(l) 1 Co. 85. a. S. P.

(m) Fitz. Feoffments & Faits 8. S. C. Br. Eſtates 18. S. C.

3. If a Man gives in Tail, reſerving Rent to him and his Heirs, it is an Eſtate in Fee in the Rent. 7 H. 6. 4.

4. But it is otherwiſe if Rent be reſerved to him and his Heirs on a Leaſe for Life, for there it is but for the Life of the Leſſee. 7 H. 6. 3. b.

5. If one giveth Lands to one & *hæredibus* (omitting *ſuis*) he hath a Fee. *Co. Lit.* 8. *b.*

(a) 6 Co. 27. a. S. P.

6. (a) But if one gives Lands to another, *habendum* to him or his Heirs, he hath but for Life, for the Incertainty. *Co. Lit.* 8. *b.*

Eſtate in Fee by Deviſe.

(N) (b) (c) By what Words.

(b) Latch 42. Salk 235.
(c) By Releaſe of his Lands to another and his Heirs. 1 And. 33. N. Bend. 30. pl. 50. 2 And. 13.
(d) Moor 594. pl. 804. L. P. adjudged infra 13. L. P.

1. (d) IF a Man hath three Daughters, and deviſeth certain Land to his Wife for Life, and after her Death to his three Daughters, equally to be divided; by theſe Words no Eſtate in Fee is deviſed to the Daughters, but only an Eſtate for Life. Mich. 15 Jac. B. R. inter (e) King and Remball, held at the Bar.

(e) Cro. Jac. 448. S. C. but S. P. does not appear.

2. If a Man deviſeth Land to his Wife for Life, and after her Death to his three Daughters, equally to be divided, and if one dies before the others, (f) then one to be Heir to the other, equally to be divided; by theſe Words an Eſtate in Fee is deviſed to the Daughters. Mich. 15 Jac. B. R. inter (g) King and Remball, agreed by the Council at the Bar.

(f) Where by ſuch Words croſs Remainders are implied. Hob. 34. Wood and Ingoſul, Cro. Jac. 260. 1 Bulſt. 62. and vid. Ow. 25. 1 And. 38. 194. Savil 92. Cro. Jac. 695. Moor 637. Raym. 455.

(g) Cro. Jac. 448. S. C. but S. P. does not appear. 1 Rol. Abr. 836. pl. 6. S. C.

3. If A. ſeiſed of Land in W. in Fee, deviſeth it to B. his Son for Life, and then to remain to C. the Son of B. except B. purchaſes another Houſe with ſo much Land of as great a Value as the ſaid Land in W. is for the ſaid C. and then B. ſhall ſell the ſaid Land in W. as his own Land, and the ſaid B. ſhall pay to his Siſters 10 l. viz. to each 20 s. per Annum; in this Caſe C. hath a Fee in the Land in W. B. not having made any Purchaſe of other Land, for although the firſt Words by themſelves have given but an Eſtate for Life, yet the Word (h) Purchaſe, in the ſecond * Clauſe, imports in common Speech, an abſolute Purchaſe in Fee, altho' a Purchaſe may be alſo for Life. And the other Words, if he purchaſes other Land, &c. then he ſhall have Power to ſell it, and not before that Purchaſe. Hobart's Reports 89. inter (i) Greene and Armeſteed, adjudged 12 Jac.

* Fol. 834.

(h) Whether a Clauſe, that the Deviſee ſhould not ſell to any but A. imported a Fee, vid. Cro. Car. 157. 1 Jon. 211. Bridg. 136.

(i) Hob. fol. 65. S. C. Greeve and Duel, Cro. Jac. 599. S. C. adjudged.

4. If a Man by his Will appoints his Executors to purchaſe Land of 100 l. per Annum for his younger Sons, it will be a Fee. Hobart's Reports 89.

5. If a Man deviſeth Land to B. and that he ſhall (k) pay for it 10 l. altho' that is not to the Value of the Land, yet it is a Fee-ſimple. Co. Lit. 9. b.

(k) So if A. reciting by his Will, that he was indebted to B. in Conſideration B. would releaſe his Executor, he gives him Land, B. hath a Fee. Brian and Baldwin, 1 And. 35. N. Bendl. 16. pl. 19.

6. (a) **If a Man deviſeth Land to another** (b) imperpetuum, **it is an Eſtate in Fee.** Trin. 11 Jac. B. R. **in** (c) Whiting **and** Welkin's **Caſe,** per Curiam. Co. Lit. 9. b.

(a) **Chamberlain** and **Turner,** S.P. Cro. Car. 129.

adjudged, 1 Jon. 195. adjudged. —— But a Deviſe to one for Life **in perpetuum,** is but for Life. 3 Keb. 53. per **Twisden.** (b) But a Deviſe to one for ever, **habendum** for Life, is but for Life. Lat. 43, 44. ſaid by **Dodderidge** to have been adjudged. (c) 1 Bulſt. 219, 220. S. C.

7. (d) **If a Man deviſeth Land to another, to give and** (e) **ſell, it is a Fee.** Co. Lit. 9. b.

(d) There being no expreſs Eſtate given him, but impowered to convey a Fee, he is conſtrued to have one. Salk. 240. and **vid.** Godb. 46. (e) But if one deviſes Lands to **A.** and **B.** upon Condition, that if they ſell to any but his Son **C.** he ſhall enter, they have but for Life, becauſe ſuch Eſtate may be ſold. **Anly** and **Chapman,** Cro. Car. 157. adjudged, 1 Jon. 211. adjudged.

8. **So a Deviſe to another in** (f) **Fee-ſimple is a Fee.** Co. Lit. 9. b.

(f) But if one deviſes the Fee-ſimple to **A.** and after her Death to her Son, ſhe hath but for Life, and the Son the Fee-ſimple. **Baker** and **Raymund,** 1 And. 51. adjudged, N. Bend. 300. pl. 293. adjudged.

9. **So a Deviſe to another and** (g) **his Aſſigns, for ever, is a Fee.** Co. Lit. 9. b.

(g) A Deviſe to one and his Aſſigns, without ſaying for ever, is but for Life. Co. Lit. 96. —— But a Deviſe to one, and his, is a Fee. N. Bend. 11. pl. 9. Lat. 40.

10. **If a Man deviſeth Land to another** & ſanguini ſuo, **it is a Fee.** Co. Lit. 9. b. **Where** Mich. 40 & 41 Eliz. inter Downhall **and** Catesby, **is cited to be adjudged.**

11. **If a Man ſeiſed in Fee of a Houſe and Land, and deviſeth the Moiety of his Houſe to his Wife for Life.** Item, **He deviſeth the other Moiety of his Houſe to J. his ſecond Son.** Item, **He deviſeth to J. his ſecond Son, the ſaid Houſe, and all the Land that belongs to it, after the Death of his Wife; J. ſhall have an Eſtate for Life only after the Death of the Wife, and not an Eſtate in Fee.** Paſch. 7 Jac. B. R. (h) Fawcet's **Caſe adjudged.**

(h) 1 Rol. Abr. 844. M. 3. S. C.

12. **If** A. **ſeiſed in Fee of Land, makes his Will in theſe Words,** I bequeath to my Wife my (i) (k) whole (l) Eſtate, paying Debts and Legacies, **and dies, making his Wife Executrix, his Debts and Legacies being** 40 l. **and his Perſonal Eſtate but** 5 l. **his Wife ſhall have a Fee by Force of the ſaid Words,** My whole Eſtate, **for thoſe Words extend to his Land, according to common Speech, and alſo to his whole Eſtate in the Land.** Trin. 1651. inter (m) Johnſon **and** Kerman, **adjudged by the whole Court on a Special Verdict.** Intratur Hill. 1649. Rot. 153.

(i) Where by Deviſe of all one's Tenant right Eſtate, the Fee in Lands of that Nature paſſes, **Wilſon** and **Robinſon,** 2 Lev. 91.

adjudged, 1 Mod. 100. **adjornatur,** 3 Keb. 180, 245. adjudged, 3 Mod. 46. cited. (k) So where one deviſes to one for Life, and after her Death his whole Remainder to another, he hath a Fee. Lutw. 764. adjudged. (l) Where by Deviſe of all his Eſtate a Fee paſſes, **Reeves** and **Winnington,** 3 Mod. 45. adjudged, Skin. 194, 195. **Carter** and **Horner,** 4 Mod. 89. 1 Show. 348. Skin. 195. 2 Show. 328, 367. 2 Mod. Caſ. 92. Counteſs of **Bridgewater** and **Bolton,** Salk. 236. 6 Mod. 106. Fitzgib. 10. **vid.** 2 Rol. Rep. 479. By Deviſe of all my Hereditaments, Fitzgib. 10. **per Holt.** (m) Stil. 281, 293. S. C. 1 Mod. 100. S. C. cited, 3 Mod. 45. S. C. cited, 4 Mod. 90. Skin. 194. cited.

13. (n) **If a Man deviſeth Land to his Sons and Daughter, equally to be divided, it is not any Eſtate in Fee, but only for Life, for the equal Diviſion doth not go to the Continuance of the Eſtate, but to the ſeveral Occupation.** (o) Mich. 3 Car. **in Chancery, reſolved by Sir** Thomas Coventry, **Lord Keeper, on the Certificate of Juſtice** Jones, **the Law to be ſuch, and that it had been** (p) **adjudged accordingly in the King's Bench.**

(n) Supra 1. L. P.

(o) Lutw. 763. S. C. cited.

(p) **Deacon** and **Marſh,** Moor 594. pl. 804. Cro. El. 330. adjudged accordingly.

14. If

14. If a Man ſeiſed in Fee of ſome Lands, and alſo poſſeſſed of certain Leaſes of Land, deviſeth the Leaſes to J. S. and afterward deviſeth to his Executor all the Reſidue of his Eſtates, Mortgages, Goods, &c. his Debts paid, and Funeral Expences diſcharged, * it ſhall paſs a Fee to the Executor by the Word Eſtates, being coupled with the Word Goods. Hill. 10 Car. B. R. inter (a) Wilkinſon and Meream, per Curiam, on a Special Verdict.

* Q. If this ſhould not be It ſhall not paſs a Fee.

(a) Cro. Car. 447, 449. S. C. Jon. 380. S. C. 1 Mod. 100. S. C. cited, Goulſ. 183.

15. If a Man ſeiſed in Fee of Black-acre, and ſeiſed alſo in Fee of other Land, on a Mortgage made to him by J. S. which is not forfeited, and deviſed Black-acre in Fee to his Brother, and all the Reſidue of his Goods, Leaſes, Mortgages, Eſtates, Debts, Duties, Demands, Houſhold-ſtuff, Linen, Bedding, Bonds, Specialties, and other Things whatſoever, whereof he was poſſeſſed, he deviſeth to his Wife, in that Caſe the Wife ſhall have at moſt but an Eſtate for Life in the Land mortgaged to him, and not a Fee, for it is coupled with Chattels; and the Words (whereof he was poſſeſſed) ſhew, that he intended only to paſs the Money for which the Land was mortgaged. Hill. 11 * Car. B. R. inter (b) Wilkinſon and Meream, adjudged per Curiam, on a Special Verdict. Intratur Trin. 10 Car. Rot. 1043.

* Fol. 835.

(b) Cro. Car. 447, 449.

S. C. adjudged, 1 Jon. 380. S. C. adjudged, 1 Mod. 100. S. C. cited, 4 Mod. 90. 2 Show. 328, 367.

16. If a Man ſeiſed in Fee of Land, deviſeth his Eſtate in the Land, it paſſeth a Fee. Hill. 11 Car. B. R. in the ſaid Caſe of (c) Wilkinſon and Meream per Curiam.

(c) Cro. Car. 449. S. C. and S. P.

17. If A. ſeiſed in Fee of a Houſe and Land, leaſeth it to B. for ninety-nine Years, rendring Rent, and afterwards deviſeth it to D. by theſe Words, I bequeath to *D.* my Houſe, with all the Lands (d) ninety-nine Years, the ſaid *D.* ſhall have all my Inheritance, if the Law will allow, by this Deviſe the Reverſion paſſeth to D. in Fee. Hobart's Reports 2. inter (e) Widlake and Harding adjudged.

(d) This is printed as in the Original, ſo that Words are wanting to make up the Senſe, which may be done from Hob. fol. 2. whence taken.

(e) Moor 873. pl. 1218. S. C. adjudged, Godb. 207, 208. S. C. adjudged, and that by the general Words, All his Inheritances, all other his Inheritances paſſed. Salk. 235.

18. (f) If one hath Iſſue *A. B.* and *C.* only, and deviſes three Houſes to his Wife for Life, Remainder as to one to *A.* and his Heirs, Remainder as to another to *B.* and her Heirs, the Remainder as to the Third to *C.* and her Heirs, and Wills, that if any of them die without Iſſue, the Survivors ſhall enjoy *totam illam partem* equally divided between them, and *B.* dies leaving Iſſue, and *A.* dies without Iſſue, and then the Wife dies, and *C.* hath Iſſue; by this Deviſe *C.* ſhall take only an Eſtate for Life in the Houſe of *B.* tho' the Words are, that the Survivor ſhall enjoy *totam illam partem*, for that is all the Meſſuage, and not all the Eſtate the Party dying had therein; and upon the Death of *C.* the Fee deſcends as well to the Iſſue of *B.* as the Iſſue of *C.* *Hill.* 29 *El.* between (g) *Pettiwood* and *Coke*, *Cro. El.* 52, 53. adjudged.

(f) Middleton and Swain, L. P. Skin. 339. Caſes in Parliament 207, 208, &c.

(g) Hawkins's Caſe, 2 Leon. 129, 130.

S. C. 193. Putnam and Coke, 3 Leon. 180. S. C. Cro. El. 695. S. C. cited, Caſes in Parliament 211. S. C. cited.

19. (h) If one deviſes Black-acre to his eldeſt Son, White-acre to his ſecond Son, and Green-acre to his third Son in Tail, and Wills, that if any of his Sons die without Iſſue, that then the Survivor ſhall be each other's Heir; and the eldeſt dies without Iſſue, this Remainder to the Survivor is a Fee, by Reaſon of the Words, *each other's Heir.* *Mich.* 30 *El.*

(h) Fowler and Ougley, L. P. 1 And. 194. adjudged, 1 Sav. 92. adjudged.

Between (a) *Hambleden* and *Hambleden*, 1 *Leon.* 166. *per Curiam*, but it was much doubted, whether both ſhould take, the Limitation being to the Surviyor, in the ſingular Number; but 3 *Leon.* 262. adjudged, that upon the Matter, it ſhould be as if in the plural Number.

(a) Cro. El. 163. S. C. adjudged, that they were Jointenants, and that ſo was the Meaning of the Will. Ow. 25. S. C. adjudged, that the Survivors were Jointenants. Goulſ. 100. S. C. adjourned, 1 And. 194. S. C. cited.

20. If *A.* deviſes his Lands to *B.* paying ſeveral Sums to others within two Years, tho' the annual Profits of the Land for two Years exceeds the Money to be paid, yet *B.* hath a Fee; for the Recompence, (b) tho' not to the Value of the Land, will make a Fee. *Trin.* 32 *El.* between (c) *Wellock* and *Hammond*, *Cro. El.* 204. adjudged.

(b) Tho' the collateral Sum be never ſo ſmall. 2 Mod. 26.

(c) 2 Leon. 114. S. C. adjudged, 3 Co. 21. S. C. Brid. 138. S. C. cited, and ſaid, the Reaſon was plain, becauſe not ſaid to be paid out of the Land or Profits, and the Deviſee might die before he could receive ſo much of the Profits.

21. (d) If one deviſes Lands of the yearly Value of 3 *l.* to *A.* paying to others ſeveral ſmall Sums, amounting in the Whole to 45 *s.* *A.* hath a Fee, becauſe if he pays the Money, he may die before he hath Satisfaction, and the Law intends the Deviſe for his Benefit. *Hill.* 37 *El.* (e) *Collier's* Caſe, 6 *Co.* 16. *a.*

(d) Spicer and Spicer S. P. Cro. Jac. 527. 2 Rol. Rep. 80. Godb. 280. adjudged, by Reaſon of the Payment of a collateral Sum — And that Payment of ſuch collateral Sum makes a Fee, vid. Greeve and Duel, Cro. Jac. 599, 600. Hob. 75. Bacon and Hill, Moor 464. pl. 656. Cro. El. 498. and vid. Cro. El. 204, 205. 2 Leon. 114. 3 Co. 21. Brid. 138. 1 Vent. 227. Bullen's Caſe, Moor 361. pl. 494. Goulſ. 134. Pell and Brown, Cro. Jac. 591. 2 Rol. Rep. 220. Palm. 137. (e) Cro. El. 378. S. C. adjudged, upon a Special Verdict, and ſaid, the finding of the Value was not material. 2 Mod. 25. S. C. cited.

22. But if the Deviſe to *A.* had been to the Intent, that with the (f) Profits he ſhould educate his Daughter, or with the Profits pay ſo much to one, and ſo much to another, he would have had but an Eſtate for Life, in as much as he would be ſure of having no Loſs. *Hill.* 37 *El.* in *Collier's* Caſe, 6 *Co.* 16. *a.* reſolved *per Curiam.*

(f) But where a Deviſe was to A. upon Condition, to allow the Son of the Teſtator (who had no other Proviſion) Meat, Drink, &c. during his Life, it was held A. had a Fee, becauſe the Son ought to have Maintenance immediately, which would be a Charge to A. before he could receive any Profit. Lee and Withers, 2 Jon. 107. adjudged, 2 Shower 49. adjudged, Pollexf. 539. adjudged, and vid. 2 Shower 83.

23. (g) If one deviſes Lands of the yearly Value of 3 *l.* to *A.* paying thirty, forty, or fifty Shillings (h) yearly to another, this is but an Eſtate for Life, for he may pay it out of the Profits, and is ſure of having (i) no Loſs. *Hill.* 37 *El.* in *Collier's* Caſe, 6 *Co.* 16. *a.* reſolved *per Curiam.*

(g) Where the Payment being yearly, it makes no Fee, vid. Hob. 65. Cro. Car. 158. (h) Where one being bound in an Obligation, that his Wife ſhould be paid 40 l. yearly for her Life, by ſeveral Clauſes in his Will deviſes all his Lands among his Sons ſeverally, every one paying thereout his Part of the 40 l. yearly to his Wife; by this they have only an Eſtate for Life, becauſe the Money paid is no collateral Sum, but quaſi an annual Rent out of the Profits. Anſley and Chapman, Cro. Car. 157, 158. per Curiam; and that it did not follow, becauſe the eldeſt had a Fee, the others muſt. 1 Jon. 211. adjudged, Pollexf. 544. cited, 2 Mod. 25. cited. —— But yet where there is a Deviſe to A. paying 10 l. yearly to B. it ſeems a Queſtion, whether B. has not a Fee, for that the Eſtate ought to continue as long as the Payment. Spicer and Spicer, Cro. Jac. 527. Godb. 280. 2 Rol. Rep. 80. Read and Hatton, 2 Mod. 25, 26. Cart. 225. and vid. Pollexf. 544, 545. 6 Mod. 113. but may it not after the Death continue as a Charge on the Lands, as in Moor 721. pl. 1007. —— Or may it not be taken as a Deviſe to A. for the Lives of A. and B. and ſo the Eſtate continues as long as the Payment. (i) But if there be any Poſſibility of Loſs, it will be a Fee, as if one deviſes Lands of the yearly Value of 16 l. to his Son R. on Condition that he pays his two Siſters 5 l. yearly, the firſt Payment to begin at the firſt of the Four uſual Feaſts which ſhall next happen after the Death of the Teſtator, ſo that the Feaſt be a Month after his Death; this is a Fee, for if the Teſtator ſhould die a Month before Chriſtmas, and R. ſhould pay, and die the Day after, he might be a Loſer. Reed and Hatton, 2 Mod. 25. adjudged, Cart. 225. adjudged. —— And vide the Caſe of Freak and Thomas, where one being ſeiſed of Lands of the yearly Value of 10 l. and deviſed thereout Legacies to the Value of 120 l. to be paid within one Year, and then gives the Land to A. and it was held he had a Fee. 2 Levinz 249. 2 Jon. 113. Pollexf. 553, 554. and ſaid to be adjudged pro quer. 2 Show. 36, 37, &c. 42; and ſaid the Judgment for the Plaintiff in Pollexfen ſeemed to be a Miſtake.

(a) Cro. Jac. 695. L. P. adjudged, and vid. Cro. Car. 185.

24. (a) If one having Gavelkind Lands, and three Sons, deviſes Part to one Son, Part to another, and the Reſt to the Third, and that if any of them die without Iſſue, that the other ſhall be his Heir; this is a Tail with (b) croſs Remainders in Fee to each other. *Mich.* 13 *Jac.* (c) between *Sparks* and *Purnell*, *Moor* 864. *pl.* 1190. adjudged.

(b) Where by ſuch Words croſs Remainders are implied. Hob. 34. Wood and Ingorſal, Cro. Jac. 260. 1 Bulſt. 62. Forteſcue and Abbot, 2 Jon. 79, 80. 2 Levinz 202. 2 Keb. 788, 824. and vid. Ow. 25. 1 And. 38. 194. Sav. 92. Cro. Jac. 695. (c) Hob. 75. S. C. but ſaid, where the Brother to whom made Heir had but for Life, the Survivor ſhall have no more. —— But generally ſpeaking, making one his Heir, gives a Fee, Tilly and Collier, 2 Levinz 162. 3 Keb. 589. tho' miſ-ſpelt, as Ayre for Heir. Stil. 301, 307, 319. 2 Sid. 75.

(d) But if given to his Wife for Life, and then to be at her Diſpoſal to any of her Children, ſhe hath but an Eſtate for Life, with Power to diſpoſe of the Inheritance to her Children. Salk. 239, 240. adjudged, and a Diverſity taken by Parker Ch. Juſt. where an expreſs Eſtate, or not, is given, with Power to diſpoſe, for which vid. Lief and Saltington, 1 Mod. 189. Cart. 232. 2 Levinz 104. and vid. Dal. 58. Ow. 32. Moor 57. pl. 162. 3 Leon. 71. 4 Leon. 41. Cro. Jac. 199. (e) But a Deviſe of Lands to one, to diſpoſe of at his Will and Pleaſure, ſeems to be a Fee. 1 Leon. 156, 283. 2 Leon. 116. N. Bendl. 11. pl. 9. Lat. 40. Cart. 232. (g) Lat. 9, 39, 134. S. C. argued by the ſeveral Judges, who differed in Opinion as to the Wife's Eſtate, tho' all agreed her Diſpoſition to the ſecond Son good. Noy 80. S. C. Stil. 259. S. C. cited.

25. One by Will deviſed his Houſe to his (d) Wife, (e) to (f) diſpoſe of at her Will and Pleaſure, and to give it to ſuch of his Sons as ſhe thinks beſt. *Hill.* 22 *Jac.* between (g) *Daniel* and *Ubley*, 1 *Jon.* 137. by *Crew* and *Jones*, the Wife had an Eſtate for Life, to do therewith at Pleaſure, and Power to diſpoſe of the Reverſion to any of the Sons; and if not done by Her, the Heir of the Teſtator may enter; but by *Whitlock* and *Dodderidge*, the Wife had a Fee in Truſt, to diſpoſe thereof to ſome of the Sons.

26. If one deviſes Lands to *A. B.* and *C.* and the Survivors and Survivor of them (not ſaying to their Heirs) upon ſuch Truſts as may continue for ever, the Truſtees by Implication take a Fee, for there is no Difference between a Deviſe to a Man for ever, and to a Man upon ſuch Truſt which may continue for ever. *Paſch.* 1 *Geo.* 2. between *Shaw* and *Weigh*, *Fitzg.* 18. adjudged *per totam Curiam.*

(O) By what Words it may be created.

1. If a Deviſe be to a Man and his Succeſſors, it is a Fee, for by the Word Succeſſors is intended Heirs, for the Heir ſuccedit Patri. By Reports, 14 Jac. (h) Webb and Herring.

(h) Cro. Jac. 415. S. C. Moor 852. pl. 1164. S. C. and S. P. per Coke Ch. Juſt. 1 Rol. Rep. 398, 399, 436. S. C. and S. P. per Coke, quod fuit conceſſum per Croke. Bridg. 84, 85. S. C. 3 Bulſt. 194. S. C. and S. P. per Coke, to which Croke agreed, and after the whole Court agreed.

2. If a Man deviſeth Land to W. his Son for Life, and afterwards that it ſhall remain to Thomas, Son of W. unleſs W. purchaſe for Thomas ſo much Land of as great a Value as the ſaid Land, and deviſeth over that the ſaid Thomas ſhall pay 10 l. by 20s. per Annum, to his Siſters, in that Caſe Thomas hath a Fee in that Land, becauſe the Words (unleſs *W.* purchaſe ſo much Land for *Thomas*) by which is intended a Fee, and by the Words (of as good Value) is intended the Price of the whole Land and the Eſtate, and not the yearly Value. Mich. 13 Jac. B. R. inter (i) Greene and Armeſteed adjudged.

(i) Hob. 65. S. C. Greeve and Duel, Cro. Jac. 599, 600. S. C. adjudged.

3. If a Deviſe be to a Man, paying ſo much Rent yearly to the Poor of ſuch a Corporation (a) for ever, and for Default of Payment, that the Corporation ſhall have the Land for ever, it is a Fee, becauſe the Words, for ever, ſhew his Intent. My Reports, 14 Jac. (b) Webb and Herring.

(a) Deviſe to one, and that he ſhould pay ſo much yearly to another and his Heirs, is a Fee, for the Payment being to be for ever, the Eſtate out of which ought to be ſo ſaid to be a plain Caſe. 3 Bulſt. 194. per Coke (b) Cro. Jac. 415. S. C. Moor 852. pl. 1164. S. C. 1 Rol. Rep. 398, 399, 436. S. C. Bridg. 84, 85. S. C. adjudged, 3 Bulſt. 194, 195. S. C. adjudged.

Eſtate-tail by Deviſe.

(P) By what Words by Implication.

1. (c) If a Man deviſeth Land to A. his Daughter and her Heirs, and if ſhe dies without Iſſue, that it ſhall remain to B. his Daughter and her Heirs, and if both † die without Iſſue, to another, it is an Eſtate-tail, altho' an expreſs Eſtate in Fee was given. Dy. 16 El. 330. 20. (d) Clache's Caſe.

(c) Prettiman and Coke, L. P. adjudged, 2 Leon. 129, 195. 3 Leon. 189. Cro. El. 52, 53. † Where an Eſtate-tail ſhall be implied, or not, by the Words dying without Iſſue. Dal. 44. Goulſ. 134, 135. Cro. El. 525. Noy 64. Palm. 133. Bridg. 1, 2. Ray. 453. Skin. 18, 19, 266, 558. 2 Jon. 172. —— Dying without Fruit. Moor 637. pl. 877. —— Diverſity where the Dying without Iſſue is general, and where in a certain Time. Moor 464. Cro. El. 497. 1 Rol. Rep. 219. 4 Mod. 317. —— But to one and his eldeſt Iſſue Male, and for Want of ſuch Iſſue, Remainder to another, does not create an Eſtate-tail, Lovelace and Lovelace, Savil 75. adjudged, Cro. El. 40. adjudged, 2 Leon. 35. adjudged, 1 And. 132. adjudged. —— If one deviſes, that if his eldeſt Son dies before he hath Iſſue, then, &c. this is a Tail, as if he had ſaid without Iſſue. Moor 127. pl. 275. Ow. 29, 30. 1 Sid. 148. —— But where a particular Eſtate is named, no other ſhall be implied. 1 Rol. Rep. 220. Palm. 134. (d) Hard. 149. S. C. cited.

2. If a Man deviſeth Land to B. his younger Son and his Heirs, and that if he dies without Iſſue living A. his elder Son, that the Land ſhall remain to A. in Fee, it is an Eſtate in Fee in B. and not a Tail, and only a Poſſibility in A. to have the Land, or not, on the Death of B. without Iſſue in his Life. Mich. 18 Jac. B. R. inter (e) Browne and Pells, adjudged per totam Curiam on Argument on a Special Verdict.

(e) Cro. Jac. 590. S. C. adjudged, 2 Rol. Rep. 196, 216, &c. adjudged, Palm. 131, &c. S. C. adjudged, Bridg. 1, 2. S. C. adjudged, Stil. 275. S. C. cited, and ſaid it had been adjudged otherways. Hard. 150. S. C. cited, Cro. Car. 185. S. C. cited, Vaugh. 272. S. C. cited.

3. If a Deviſe of Land be to another & ſemini ſuo, it is an Eſtate-tail. Co. Lit. 9. b.

4. (f) If A. hath two Sons, ſcilicet B. and C. by ſeveral Venters, and ſeiſed in Fee of Land, Black-acre and White-acre, deviſeth Black-acre to B. in Fee, and White-acre to C. in Fee, under this Proviſo following, That if it ſhall ſo pleaſe God either of my ſaid Sons to die before ſuch Time as they ſhall be married, or before they ſhall attain unto their Age of twenty-one Years, and without Iſſue of their Bodies to be begotten, then I give all the ſaid Lands which I have by * this my Will given unto ſuch of my ſaid Sons, which ſhall ſo die before Marriage, or before their Age of twenty-one Years, and without Iſſue of their Bodies begotten, unto ſuch of thoſe my ſaid two Sons as ſhall the other ſurvive, any former Gift thereof notwithſtanding in this Will to the contrary, and dies; and afterwards B. takes a Wife, and hath Iſſue a Daughter, and dies; and afterwards C. comes to full Age, and dies without Iſſue before Marriage; in this Caſe there is not any Eſtate-tail in B. and C. but a Fee on the ſaid Contingency of Mar-

(f) Hard. 148. S. P. not determined, Skin. 144. L.P. adjudged.

* Fol. 836.

Marriage or Death before twenty-one without Iſſue, to come to the Survivor for Life only. Hill. 1650. inter (g) Hanbury and Cockerell & alios, on a Special Verdict adjudged per Curiam. Intratur, Trin. 1650. Rot. 174.

(g) Hard. 192. S. C. cited.

5. If a Man hath a Wife, a Son, and three Daughters, and he deviſeth Land to the Son after the Death of the Wife, and if the three Daughters ſurvive the Wife and the Son and his Heirs, to them for their Lives; the Son ſhall have a Tail, becauſe otherwiſe the Remainder would be void; and if it ſhall be a Fee, the Daughters ſhould have the Land as Heirs to the Son, and the Remainder idle. By Reports Trin. 14 Jac. (a) Webb and Herring adjudged B. R.

(a) Cro. Jac. 415. S. C. adjudged, Moor 852. pl. 1164. S. C. adjudged, 1 Rol. Rep. 398, 399, 436. S. C. adjudged, Bridg. 84, 85. S. C. adjudged, 3 Bulſt. 192, 193. S. C. adjudged, and a Diverſity taken by the whole Court where a Remainder is limited to a collateral Heir, and where to a meer Stranger. Cro. Jac. 448. and vid. 2 Levinz 162. 3 Keb. 589, 590. Hearn and Allen, Cro. Car. 57, 58. Hut. 85, 86. Lit. Rep. 4, 5, 6, &c. 3 Levinz 70, 71. Salk. 233, 234, 238. 4 Mod. 317. Vaugh. 269, 270. Skin. 269. 3 Mod. 123.

6. So if a Man hath two Sons, and deviſeth to the Younger, and if he dies without Heirs, to the elder in Fee, it is a Tail, for it is as much as if he had ſaid, that he deviſed to the Younger, and to the Heirs of his Body, otherwiſe the Remainder would be void, the Elder being Heir to him. Trin. 14 Jac. By Reports, per Coke.

7. If a Man hath Iſſue three Daughters, A. B. and C. and deviſeth Land in this Manner: I give to Joan my Wife all my Houſes and free Land for her Life, and after her Deceaſe I will it to my three Daughters A. B. and C. to be equally divided; and if any of them die before the other, then the one to be the other's Heir, equally to be divided; and if my three Daughters die without Iſſue, I will it to J. S. and J. S. (two Strangers.) By this Deviſe the three Daughters have an Eſtate-tail and not a Fee, for the Intent of the Deviſor is apparently ſo on the whole Will; for the Clauſe, and if they die without Iſſue, and the Limitation of the Remainder over, explain what Heir he intended before, when he ſaid that one ſhould be Heir to the other; otherwiſe the Remainder would be void. Mich. 15 Jac. B. R. inter (b) Kinge and Remball adjudged clearly, per totam Curiam, on a Special Verdict.

(b) Cro. Jac. 448. S. C. adjudged.

8. If a Man deviſe Land to his three Daughters, equally to be divided, and if one dies before the others, that then the one ſhall be Heir to the other: By theſe Words the Daughters have not any Eſtate-tail. Mich. 15 Jac. B. R. inter (c) Kinge and Ramball, agreed by the Counſel at the Bar, and per Curiam.

(c) Cro. Jac. 448. S. C. but S. P. does not appear. 1 Rol. Abr. 833. pl. 2. vid. and the Notes there.

9. If a Man deviſeth to Two for their Lives, the Remainder to their two Sons, equally to be divided, and to their Heirs, and each to be Heir to the other; and that if both (naming them) ſhall die without Iſſue, that it ſhall remain to another, it is an Eſtate-tail by the Limitation of the Remainder over, but by the Words before without theſe, it had been a Fee-ſimple. Paſch. 12 Jac. B. R. inter (d) Johnſon and Smart per Curiam reſolved.

(d) 2 Rol. Abr. 416. pl. 3. S. C.

10. If a Man ſeiſed in Fee deviſeth it to his Wife till his elder Son comes to the Age of Twenty-four, and deviſeth 4 l. to be paid out of the Land to his younger Son, and if the elder Son dies that the younger Son ſhall have it; and if he dies, that then it ſhall be divided between his two Daughters, and if they die, that then his Executors ſhall ſell it, &c. By this Deviſe the elder Son ſhall have only an Eſtate for Life, and not any Eſtate-tail, for his Intent doth not appear to be that it ſhould be a Tail. Paſch. 41 El. B. R. inter Legwood and Burriſh adjudged.

11. If a Man deviſeth Land to R. his (a) elder Son for ever, and after his Death to the Heir Male of his Body for ever, & pro defectu talis Hæredis maſculi to E. his elder Son for ever: R. by this Deviſe hath an Eſtate-tail, and not an Eſtate for Life. Trin. 11 Jac. B. R. inter (b) Welkins and Whiting, adjudged per Curiam.

(a) This is printed as in the Original, but ſhould be younger Son, as appears by the

Report in 1 Bulſt. 219. (b) 1 Bulſt. 219, 220. S. C. adjudged per totam Curiam.

* 12. If a Man deviſeth Land to his Wife for Life, and afterwards to his Son, (c) and if his Son dies without Iſſue, having no Son, that another ſhall have it; the Son hath an Eſtate-tail to the Heirs Male of his Body by this Deviſe. Trin. 7 Jac. B. R. inter (d) Robinſon and Miller per Curiam.

* Fol. 837.

(c) Otherwiſe if the Deviſe had been to the Son for

Life, and if he dies without Iſſue. Salk. 236. and vid. 1 Vent. 229. Hob. 30. and vid. ante 179. pl. 1. in the Notes there. (d) 2 Brownl. 271. S. C. adjudged, Moor 682. pl. 939. S. C. but differently ſtated. Lit. Rep. 259. S. C. cited.

13. If a Man deviſeth to his elder Son for Life, the Remainder to the Sons of his Body lawfully begotten, and if they alien, that his Daughters ſhall have the ſame Eſtate, Remainder to his right Heirs; the elder Son hath only an Eſtate for Life and no Eſtate-tail, but his Son ſhall have it by Purchaſe, becauſe it is expreſly limited that he ſhall have it only for Life. (e) Mich. 10 Jac. B. R. per Curiam.

(e) 2 Levinz 59. S. C. cited, 4 Mod.

318. S. C. cited, 1 Vent. 231. ſeems to be S. C. cited, and fol. in Rol. miſprinted, and ſaid, the Deviſe was to the eldeſt Son for Life, & non aliter, tho' not printed ſo in the Book.

14. A Deviſe to one and his Heirs Males is an Eſtate-tail, the Law ſupplying the Words *of his Body*. *Co. Lit.* 27. *a.*

15. If one deviſes Lands to his Son *A.* and his Heirs, and if he dies within Age, or without Iſſue, that it ſhall be divided between his other Sons, ſeems an Intail. *Mich.* 37 *Eliz.* between (f) *Soulle* and *Gerrard*, *Cro. Eliz.* 525. adjudged, and that *A.* having Iſſue a Daughter, and dying before twenty-one, the Daughter ſhould have it, and that the Disjunctive *or* ſhould be taken for the Copulative *and*.

(f) Moor 423. pl. 590. S. C. adjudged, Noy 64. S.C. but not fully ſtated.

16. If one deviſes to *A.* for his Life, and after to the next Heir Male of *A.* and to the Heir of the Body of ſuch next Heir Male, *A.* hath but an Eſtate for Life, and upon his Death his eldeſt Son will take an Eſtate-tail. (g) *Archer*'s Caſe, *Mich.* 39 & 40 *El.* 1 *Co.* 66. adjudged, tho' it was held, that by the Feoffment of *A.* this Remainder being in Contingency was deſtroyed.

(g) Cro. El. 453. S. C. adjudged, 2 And. 37.

S. C. adjudged, tho' this Point not ſo fully mentioned. Stil. 249. S. C. cited, 1 Vent. 216, 232. S. C. cited, and ſaid, that the Words of Limitation being put to the Word Heir, it was taken to be deſignatio Perſonæ. 3 Levinz 433. S. C. cited, Fitzg. 24. S. C. cited, and vid. a like Caſe there reported, and many Caſes cited.

17. If one deviſes to *A.* for Life, Remainder to *B.* and the Heirs of his Body, Remainder to *C.* and his Wife for their Lives, and after their Death to their Children, they then having Children, *C.* and his Wife take only an Eſtate for Life, with Remainders to their Children for Life, and no Eſtate-tail. *Hill.* 41 *El.* (h) *Wild*'s Caſe, 6 *Co.* 16. reſolved, being for the Difficulty argued before all the Judges of *England*.

(h) 2 Levinz 58. S. C. cited, 1 Vent.

229. S. C. cited, and ſaid by Hale, that this was the only Point adjudged in this Caſe, and that too againſt the Opinion of Popham and Gaudy. 1 Vent. 230. S. C. cited, and ſaid it was admitted therein, that if the Deviſe had been to the Children of their Bodies, it would have been a Tail. 1 Vent. 231. S. C. cited, and ſaid to be adjudged, becauſe having given an Eſtate-tail to B. by expreſs Words, if the ſame had been meant to C. 'tis like he would have uſed the ſame Words. Secondly, It was not after their Death to the Children of their Bodies, for then there would have been an Eye of an Eſtate-tail; and Thirdly, Becauſe there were Children at the Time of the Deviſe, which was the only Reaſon went upon in the Exchequer-Chamber; and vid. Goulſ. 139.

18. If one deviſes to *A.* and his Children, or Iſſue, and he hath none at the Time, this is a Tail; for that the Deviſe being immediate, they cannot take in Remainder. In *Wild*'s Caſe, 6 *Co.* 17. *a.* reſolved.

19. (a) But if one deviſes to Husband and Wife, and after their Death to (b) their Children, and they then have no Children, yet they have but for Life, Remainder to their Children. In *Wild*'s Caſe, 6 *Co.* 17. *a. b.*

(a) 2 Levinz 59. this cited, and ſaid it was obiter dictum, and not judicially in the Caſe; and that the Caſe cited by my Lord Coke from Bendl. to maintain his Opinion, was againſt it; which Caſe vid. alſo 1 And. 43. pl. 110. (b) But where one deviſed to his Wife for Life, and after her Death to his Iſſue, it was held void for the Uncertainty which ſhould take, there being ſeveral. Taylor and Sayer, Cro. El 742. 2 And. 134. but Raym. 83. this Caſe is cited and denied to be Law; and being cited 2 Vent. 229. it was ſaid, it was a little too Rank, for that Iſſue is nomen collectivum. Fitzg. 25, 27, 28. S. C. cited by Chief Juſtice, who ſaid it had been denied to be Law, and ſo adjudged lately in C. B. and vid. my ſecond Part 514. pl. 2.

20. If one hath Iſſue *A. B.* and *C.* and deviſes Lands to *A.* and the Heirs of his Body in Fee, after the Death of his Wife; and if *A.* dies living the Wife, that *C.* ſhall be his Heir, and deviſes other Lands to *B.* and the Heirs of his Body, and that if he dies without Iſſue, that *A.* ſhall be his Heir, and deviſes other Lands to *C.* and the Heirs of his Body; and if all his Sons ſhall die without Iſſue, then all the Lands ſhall go to the Children of his Brother; if *A.* dies in the Life of the Wife, leaving a Son, *C.* ſhall not have the Lands of *A.* for tho' it is not ſaid, if *A.* dies without Iſſue in the Life of the Wife; yet upon the whole Context of the Will it cannot be well otherwiſe taken, no Intention to diſinherit any appearing. *Paſch.* 6 *Car.* between (c) *Spalding* and *Spalding*, *Cro. Car.* 185. adjudged *C.* ſhould not take ſo long as there was any Iſſue of *A.*

(c) 1 Vent. 230. S. C. cited, 3 Levinz 434. S. C. cited.

21. If one deviſes to *A.* for his Life, and after his Death (d) to the Iſſue of his Body by a ſecond Wife (he then having a firſt living) *A.* hath an Eſtate-tail. *Hill.* 22 & 23 *Car.* 2. between (e) *King* and *Melling*, 2 *Levinz* 58. it was adjudged otherways by *Twiſden* and *Rainsford*, *contra Hale*; but that Judgment was after reverſed in the Exchequer-Chamber, upon the Point in Law, where all agreed, that *A.* had an Eſtate-tail.

(d) But a Deviſe to J. S. to hold to him and his eldeſt Iſſue Male, and for Want of ſuch Iſſue, the Remainder over, &c. gives J. S. but an Eſtate for Life. Lovelace and Lovelace, 1 And. 132. adjudged, 2 Leon. 35. adjudged, Cro. El. 40. adjudged, and Savile 75. adjudged the eldeſt Son (when born) had but for Life, vid. the Caſe well reported, Moor 371. cited. (e) 1 Vent. 214, 225. S. C. reported as firſt adjudged in B. R. without taking Notice of the Reverſal in Cam. Scac. 3 Keb. 42, 52, 95. S. C. adjudged, and after reverſed accordingly. Pollexf. 101, 102, &c. S. C. adjudged it was an Eſtate-tail, and the firſt Judgment reverſed accordingly. Fitzg. 25. S. C. cited.

22. If *A.* having Iſſue *B.* and *C.* deviſes to his Wife for Life, if ſhe don't marry, but if ſhe marries, *B.* ſhall preſently (f) after enter, and hold to him and the Heirs Male of his Body, Remainder to *C.* in Tail Male, *&c.* and the Wife does not marry, and dies, *B.* ſhall have an Eſtate-tail, for ſo by the Scope of the Will it ſeems intended; and rather than that Intention ſhall be defeated, the Words ſhall be taken thus, *viz. If ſhe marries* B. *to enter preſently, and if not, that* B. *ſhall hold in Tail Male, Remainder*, &c. *Mich.* 34 *Car.* 2. between *Luxford* and *Luxford*, 3 *Levinz* 125. adjudged.

(f) In the Report of the Caſe in Levinz, it is ſaid, preſently after her Death, but I ſuppoſe it miſ-printed, and that it ſhould be, after her Marriage.

23. If *A.* ſettles Lands to the Uſe of *B.* his Son, for his Life, Remainder to his firſt and every other Son by his then Wife in Tail Male, and after *A.* having the Reverſion in Fee, and reciting the Settlement, by his Will declares, that if the Wife of *B.* dies without Iſſue Male, in the Life of *B.* then *B.* ſhall have Power to make a Jointure to another Wife, and that for Want of ſuch Iſſue Male the Lands ſhall remain to the Sons of *B.*

by any other Wife; and in Caſe of Failure of Iſſue Male of *B.* then all the Lands ſhall go to the Grandaughters of *A.* *B.* hath not an Eſtate-tail by Implication, and the Eſtate for Life in the Settlement, cannot be tacked to the Words in the Will. *Mich.* 4 *Will.* between (a) *Moor* and *Parker*, 4 *Mod.* 316. adjudged, and that a Recovery ſuffered by *B.* who after died without Iſſue, did not bar the Grandaughters.

(a) Skin. 558. S. C. adjudged, in which it appears, that after the Power given to make a Jointure to the ſecond Wife, the Deviſe was to the firſt and every other Son of B. in Tail Male ſucceſſively; and it was ſaid by Holt Ch. Juſt. that if the Deviſe had been to the Heirs of the Body of B. it could not have been a Tail executed, being by ſeveral Conveyances.

24. If one deviſes to *A.* for his Life, without Impeachment of Waſte, and if *A.* hath any Iſſue Male, then to ſuch Iſſue Male and his Heirs, and if he dies without Iſſue Male, then to *B.* and his Heirs, *A.* hath only an Eſtate for Life, the Remainder in Fee in Contingency to veſt in the Iſſue of *A.* or in *B.* as may happen, for the Inheritance is annexed to the Iſſue, and the expreſs Eſtate deviſed to *A.* ſhall not be deſtroyed by Implication. *Trin.* 5 *Will.* between (b) *Lodington* and *Kime*, *Salk.* 224. reſolved; and that by a Recovery ſuffered by *A.* it was barred.

(b) 3 Levinz 431. S. C. and S. P. reſolved, and the rather, becauſe of the Clauſe, without Impeachment of Waſte, tho' no Judgment was given, a new Point being ſtarted to be argued, and before that was determined the Parties agreed. Fitzg. 21. S. C. cited by Raym: Ch. Juſt. who ſaid there was a Miſtake in the Report thereof by Levinz, for that he himſelf heard Judgment given by the Court ſeriatim, and that it had a Deciſion alſo in other Places, as in Chancery, and upon an Appeal to the Houſe of Lords, and the Point not ſince ſhaken, but acquieſced in ever ſince.

Eſtate-tail or Fee.

(Q) (c) By (d) what Words.

(c) My Lord Coke, in his 1 Inſt. 22. a. ſays, the moſt reſtrained Eſtate-tail he finds in the Books, is in 39 Aſſ. pl. 20.

1. **If a Gift be to A.** habendum **to him and his Heirs of his Wife begotten, it is an Eſtate-tail in A.** 18 E. 1. Libro Parliamentorum 26. inter Johannem de Sancto Johanne & Willielmum de Valencia, **adjudged by Admittance.**

where the Gift was to a Man and his Wife, and to one Heir of their Bodies, and to one Heir of the Body of that Heir only, which being adjudged in Point, ſome ſay it is an Exception out of the Rule, that all Eſtates-tail were Fee-ſimple at the Common Law, which Caſe vid. Fitz. Tail 19. Cro. Jac. 62. Pl. Com. 29. b. 1 Vent. 228. (d) Bridg. 2.

2. (e) **So if a Gift be to one and his Heirs of the Body of** Jane S. (f) **begotten, it is an Eſtate-tail, and not a Fee.** Co. 1. (g) Chudleigh 140. b.

(e) Co. Lit. 25. b.
(f) Co. Lit. 26. b. S. P.

and that it muſt be intended by him begotten, tho' ſome have ſaid otherwiſe. (g) Dillon and Frain S. C. Poph. 70, 77. 2 And. 309, 310.

3. If Lands are given to the Huſband of *A.* and to the Wife of *B.* and to the Heirs of their Bodies, they have preſently an Eſtate-tail in Reſpect of the Poſſibility that they may marry. *Co. Lit.* 26. *b.* 25. *b.*

4. But if Lands are given to two Huſbands and their Wives, and the Heirs of their Bodies, they have a joint Eſtate for Life, and ſeveral Inheritances, *viz.* one Huſband and his Wife one Moiety, and the other Huſband and his Wife the other Moiety, and no croſs Remainders or other Poſſibility ſhall by Law be allowed. *Co. Lit.* 25. *b.*

5. And

5. And if Lands be given to a Man and two Women, and the Heirs of their Bodies, they have a joint Eſtate for Life, and every of them ſeveral Inheritances, becauſe they cannot have one Iſſue of their Bodies, neither ſhall there be by any Conſtruction as of a Poſſibility upon a Poſſibility, that he ſhall marry one firſt and then the other. *Co. Lit. 25. b. 184. a.*

6. If a Gift in Tail be made to a Man and his Mother, or to a Man and his Siſter, *&c.* they have ſeveral Inheritances, becauſe they cannot marry together. *Co. Lit. 184. a.*

7. If Lands are given to one and the Heirs Male of his Body, and to him and the Heirs Female of his Body, the Eſtate to the Heirs Female is in Remainder, and the Daughters ſhall not inherit any Part, ſo long as there is Iſſue Male, for the Eſtate to the Heirs Male is firſt limited, and ſhall be firſt ſerved, and after to the Heirs Female; and Males in Conſtruction of Law are to be preferred. *Co. Litt. 377. a.*

Eſtate-tail.

(R) By what Words.

1. IF a Man makes a Feoffment to the Uſe of J. S. and his (a) Iſſue Male (b) of his (c) Body, it is not any Eſtate-tail (d) for Want of the Word Heirs. Mich. 16 Jac. B. R. inter (e) Nevell and Nevell per Curiam, altho' it be by Way of Uſe.

(a) If one gives Lands to a Man & ſemini ſuo, or exitibus de corpore ſuo, &c. he hath but for Life; for tho' the Statute provides, that **voluntas donatoris, &c. obſervetur**, yet that Will muſt agree with the Rules of Law. (b) The Words, **of his Body**, are not neceſſary to the Creation of an Eſtate-tail, for they may be expreſſed by Words that amount to as much, as if Gift to one & heredibus de carne ſua, or heredibus de ſe, &c. and the Words **de corpore** are not in the Statute. Co. Lit. 20. b. —— But they muſt be expreſſed or implied, for a Gift to a Man and his Heirs Males is a Fee. Co. Lit. 27. a. Salk. 621. (c) That it muſt be expreſſed of what Body, **vid. Abraham and Twig**, Cro. El. 478. (d) In as much as every Eſtate-tail was a Fee-ſimple at Common Law, the Word **Heirs** is neceſſary to make one by Grant. Co. Lit. 20. a. Co. Lit. 22. a. 1 Rep. 103. b. 2 Inſt. 333, 334. (e) 1 Brownl. 152, 153. S. C.

2. As if a Man makes a Feoffment in Fee to the Uſe of one in Tail, the Remainder to J. S. and J. D. and the Heirs Males of their Bodies, and for Want of ſuch Iſſue alterius eorum, to the Uſe of the Survivor of them habentis Iſſue Male, and to the Iſſue Male of ſuch Iſſue Male; and for Want of ſuch Iſſue Male of their Bodies, the Remainder to another: By this Gift J. S. and J. D. have ſeveral Inheritances, and no croſs Remainder in Tail is raiſed by the Words after, for Want of the Word Heirs, for by Way of Uſe an Eſtate-tail cannot be raiſed without the Word Heirs. Mich. 16 Jac. B. R. inter (f) Nevell and Nevell, adjudged in a Formedon on a Special Verdict.

(f) 1 Brownl. 152, 153. S.C. adjudged.

3. (g) If Lands are given to Husband and Wife, and the Heirs of the Body of the Wife by the Husband begotten, the Wife hath an Eſtate in Special Tail, and the Husband but for Life. *Lit. Sect. 28.*

(g) Cro. Jac. 475. S. P. adjudged, Repps and Bonham, S. P. Yelv. 131. adjudged, Lan. 17. adjudged, and vid. Stil. 325. Hob. 85.

4. But if Lands are given to Husband and Wife, and the Heirs which the Husband ſhall beget on the Body of the Wife, in this Caſe both of them have an Eſtate-tail, becauſe this Word (h) *Heirs* is not limited to the one more than the other. *Lit. Sect. 28.*

(h) And my Lord Coke in his Comment 26. a. ſays, this Word Heirs is nomen operativum, for to which of the Donees it is limited it creates the Eſtate-tail, and if it incline no more to the one than the other, then both take.

5. If Lands are given to the Grandfather, and to his Heirs begotten by the Father, and they both die, the Son is in as Heir to the Grandfather begotten by the Father, and the Wife of the Grandfather ſhall be endowed. *Co. Lit.* 20. *b.* according to the Opinion of ſome.

6. If Lands be given to the Son, and to the Heirs of the Body of his (a) Father, (the Father being dead) this is an Eſtate-tail within the Equity of the Statute. *Litt. Sect.* 30.

(a) So if to the Heirs of the Body of his Grandfather, the Father being dead. Co. Lit. 27. a.

7. But if Lands are given to the Son and to *his* Heirs, of the Body of his Father, it is otherwiſe; becauſe the Grant being to the Son and *his* Heirs, he cannot take as Heir of the Body of his Father, and conſequently hath a Fee-ſimple. *Co. Lit.* 27. *a.*

8. If Lands are given to a Widow, and to the Heirs of her Body by her late Husband begotten, ſhe hath but for Life, and the Tail veſts in her Son by her late Husband, (Heirs of the Body of his Father, being a good Name of Purchaſe) and if the Son dies without Iſſue, her Daughter by the ſame Husband (b) may intitle her ſelf *per formam doni. Co. Lit.* 26. *b.*

(b) 1 Rol. Abr. 841. E. 1, 2.

9. If *A.* having two Sons *B.* and *C.* makes a Feoffment to the Uſe of *C.* in Tail, and after to the Uſe of the Heirs of the Body of *A. in poſterum procreand'*, and then *A.* hath Iſſue a third Son, and *C.* dies without Iſſue, the Land ſhall go to the third Son, for the Word *in poſterum* creates a ſpecial Inheritance, (c) tho' without that it would have been a general Tail. *Mich.* 26 *Eliz.* 3 *Leon.* 87. *per Wray* Ch. Juſt.

(c) For as the Word procreatis extends to the Iſſue afterwards begot, ſo procreandis extends to the Iſſue before begotten. Co. Lit. 20. b. and vid. Cro. El. 334.

10. If *A.* makes a Feoffment to the Uſe of himſelf and the Heirs of his Body, and for Want of ſuch Iſſue to *B.* and his Heirs Males lawfully engendered, and for Want of ſuch Iſſue to the Heirs of *A.* and after *A.* dies without Iſſue, *B.* hath not an Eſtate-tail but a Fee-ſimple, becauſe it is not mentioned from whom theſe Heirs ſhould come. *Hill.* 38 *Eliz.* between (d) *Abraham* and *Twigg*, *Cro. El.* 478. adjudged; and tho' it was by Way of Uſe, it differed not from other Gifts by Deed.

(d) Moor 424. pl. 592. S. C. adjudged, the Limitation being in Latin, ad uſum B. & hæredum maſculorum ſuorum legitime procreat. & pro defectu talis exitus, to the Uſe of A. and his Heirs. Lit. Rep. 287. S. C. cited, 7 Co. 41, 42. S. C. cited, and the Reaſon thereof given, becauſe ad uſum B. & hæredum maſculorum ſuorum, &c. in the genitive Caſe, and not hæredibus de B. legitime procreat', &c. Salk. 621. S. C. cited.

11. But if *A.* makes a Feoffment to the Uſe of himſelf for Life, Remainder to *B.* and the Heirs Male of his Body, and for Want of ſuch Iſſue, to the Uſe of *C.* and of the Heirs Male of the ſaid *C.* lawfully begotten, and for Want of ſuch Iſſue, Remainder to, *&c. C.* hath an Eſtate-tail, ſo that the ſubſequent Remainders veſt; for if tranſlated into *Latin*, it muſt be *hæredibus maſculis de dict.* C. *legitime*, *&c.* that the ſubſequent Remainders may take Place. *Mich.* 5 *Jac. Beresford's* Caſe, (e) 7 *Co.* 41. adjudged.

(e) Salk. 621. S. C. cited.

12. If one gives Lands to *A.* and his Wife, *habendum* to *A.* and his Wife, to the Uſe of them and the Heirs of their Bodies, and for Want of ſuch Iſſue, to the Uſe of *B.* and his Heirs, *A.* and his Wife have a Tail, not by Execution of any Uſe by the Statute, but by Limitation of the Eſtate being to the ſame Perſons, and they are in by the Common Law. *Mich.* 7 *Car.* between (f) *Jenkins* and *Young*, *Cro. Car.* 230. *Meredith* and *Jones*, *Cro. Car.* 244. adjudged.

(f) 1 Jon. 253. S. C. adjudged.

13. If one makes a Feoffment in Fee to the Uſe of himſelf for Life, and after his Death to the Uſe of his Son *A.* and his Heirs, and (g) for Want

(g) 3 Leon. 5.

of Iſſue of *A.* to the Uſe of his own right Heirs, *A.* hath (a) an Eſtate-tail, for the ſubſequent Words plainly ſhew what Heirs were intended, and 'tis no more than if a Gift had been to one and his Heirs, *viz.* Heirs of his Body. *Mich.* 8 *Will.* between *Leigh* and *Brace*, 5 *Mod.* 266, 267, *&c.* adjudged.

(a) But vid. Bereton and Nichols & al' Cro. Car. 363. and Beck's Caſe, (which ſeems to be S. C.) Lit. Rep. 253, 285, 315, 344.

14. If a Copyholder ſurrenders to the Uſe of himſelf for Life, and after his Death to *A.* his Son, and *B.* his Wife *pro & durante termino vitar' ſuarum & hæred' & aſſignat' præd'* A. & B. *& pro defectu talis exitus*, to the Uſe of himſelf and his Heirs, *A.* and *B.* have a Fee-ſimple and not a Tail, for this muſt be conſtrued as a Conveyance at Common Law; and the Intention of the Party is not ſufficient, as in a Will, *& pro defectu talis exitus* imports nothing, for it is not ſaid *pro defectu talis exitus de corporibus dict'* A. & B. but generally, whereas every Heir is the Iſſue of ſome Body. *Paſch.* 4 *Ann.* between *Idle* and *Coke*, *Salk.* 620. adjudged by *Holt* Ch. Juſt. *Powis* and *Powell*, who ſaid the Word *of* in *Engliſh* was equal and tantamount to *de* and *ex* in *Latin*.

Tail.

(S) Of what Things an Eſtate-tail may be.

(b) My ſecond Part 518. pl. 7. 794. H. 7. and vid. Godb. 42.

1. (b) AN Eſtate-tail cannot be of a Term. Co. 10. Lovie's Caſe 87.

(c) Co. Lit. 20. a. S. P.

2. (c) A Grant of a Thing which doth not concern Lands or Tenements, nor exceſſable in Lands or Tenements, cannot be intailed within the Statute de donis conditionalibus. Co. 7. Nevill 33. b. Com. Manxell 2. b.

(d) Co. Lit. 20. b. S. P.

3. (d) An Annuity cannot be intailed within the Statute, becauſe it is perſonal. Co. 7. Nevill 33. b. Com. Manxell 2. b.

* Fol. 838.

(e) Co. Lit. 20. a. S. P. and vid. Caſes in Parl. 5.

4. (e) A Dignity, as Earl, Baron, &c. may be intailed within the Statute; for altho' it be inherent to the Blood, yet for the moſt * Part they are made Earls and Barons of ſome Place, ſcilicet, County or Honour, City or Town, and ſo concerns Land, and it ſhall pay a Relief. Co. 7. Nevill 33. b. reſolved by all the Juſtices.

5. An Eſtate-tail may be created of Offices concerning Freehold.

6. As an Eſtate-tail may be of the Office of Serjeanty in the Church of Nichol, for the Office is riſing out of the Soil. 18 Ed. 3. 27. Co. 7. Neville 33. b.

(f) But an Office that is meerly perſonal cannot be intailed; as if I grant to one and the Heirs of his Body, to be Keeper of my Hounds, &c. Co. Lit. 20. a.

7. The Office of Steward, Receiver, or Bailiff of a Manor may be intailed within the Statute, (f) becauſe it concerns Land. Co. 7. Nevill 33. b.

8. No Eſtate-tail can be of a Copyhold, by the Statute de Donis only, for the Inconvenience, that then it ſhould not be docked

by Fine or Recovery. Co. 3. (a) Haydon 8. B. Curia. Co. 9. 105. inter Thornton and Lucas adjudged. Mich. 15 Jac. B. R. inter (b) Lee and Brown, agreed per Curiam on Evidence at the Bar. Dubitatur Hill. 6 Jac. B. Placito inter Rayner and Powell, Mich. 2 Car. B. inter (c) Roydon and Nelſon on a Special Verdict in an Action of Treſpaſs; adjudged by three Judges againſt the Opinion of Yelverton, on Argument by the Court, which intratur Trin. 18 Jac. Rot. 1951. Co. Lit. 60.

(a) Sav. 66, 67. S. C.
(b) My ſecond Part 191. B. 1. which vid. and the Notes there.
(c) Cro. Car. 42. S. C. Godb. 367. S. C.

9. (d) But if the Cuſtom of a Manor warrants Eſtates-tail of Copyholds, and Remainders have been limited over by the Cuſtom, and enjoyed accordingly, then the Cuſtom co-operating with the Statute will make it an Eſtate-tail within the Statute. Co. 3. Haydon 8. b. Mich. 15 Jac. B. R. inter Lee and Brown, on Evidence at the Bar the Court ſeemed ſo to incline, and in their Direction to the Jury admitted it, for they directed the Jury to inquire whether there was ſuch a Cuſtom; for as the Cuſtom created it, ſo it might be back'd by Cuſtom. Trin. 29 El. inter (e) Hill and Upcheir cited, Co. Lit. 60. b.

(d) Eriſh and Reeves, S. P. Cro. El. 717. Godb. 368. cited, Gurry and Sanderſon, Cro. El. 907. — And what ſhall be Evidence to prove ſuch Cuſtom, Bullen and Grant, Cro. El. 148, 149. 1 Leon. 174, 175. and vid. Poph. 34. 2 Brownl. 44, 79. 1 Rol. Rep. 48, 239, 317. Stil. 450. Cart. 8. 22. Moor 128. (e) My ſecond Part 191. B. 1. S. C. which vid. and the Notes there.

10. If one makes a Gift in Tail with Warranty, this Warranty is alſo intailed, and therefore a Releaſe made by Tenant in Tail of the Warranty, ſhall not bar the Iſſue, (f) no more than his Releaſe ſhall bar the Iſſue to bring an Attaint upon a falſe Verdict, or a Writ of Error upon an erroneous Judgment given againſt the Father. *Co. Lit.* 20. *a.* 392. *b.*

(f) My firſt Part 600. pl. 4.

11. If one be created a Baronet of a certain Place, to him and the Heirs Male of his Body, he hath an Eſtate-tail in this Dignity. *Paſch.* 9 *Jac.* 12 *Co.* 81. reſolved by the two Chief Juſtices, Chief Baron, Attorney and Solicitor.

12. But if not created of ſome Place, he ſhall not have an Eſtate-tail, but a Fee-ſimple conditional, which will be forfeited for Felony. *Paſch.* 9 *Jac.* 12 *Co.* 81. reſolved.

(T) (g) By what Words.

(g) Where Limitation by Deed to A. & primogenito filio ſuo & heredibus maſculis dict. primogeniti filii, & ſic de primogenito filio in primogenitum filium ipſius A. & hered. maſculorum ſuorum, & pro defectu talis exitus, &c. Smye and Clown, 1 And. 264. Cro. El. 219. 1 Leon. 211, 212. and vid. Cro. El. 334.

1. (h) If a Man giveth to one & hæredibus de Corpore ſuo exeuntibus, the Remainder to another & hæredibus ſuis in forma prædicta, it is a good Tail in Remainder, becauſe the Words in forma prædicta refer to the Eſtate before. 20 H. 6. 36.

(h) Co. Lit. 20. b. S. P.

2. So if the Remainder had been limited to him & hæredibus ſuis prædictis. 20 H. 6. 36.

3. (i) If a Gift be to one and his Heirs, habendum to him and his Heirs, if the Donee, or his Heirs of his Body have Iſſue of their Body, and if (k) they ſhall die without Iſſue of their Body, that the Land ſhall revert to the Donor, it is an Eſtate-tail in the Donee, and not a Fee. 35 Aſſ. 14.

(i) Co. Lit. 21. a. for the habendum ſhall be conſtrued to be a Declaration what Heirs were intended in the Premiſſes; but vid. 2 Roll. Abr. 66. pl. 9. 68. pl. 24. and the Notes there; and vid. 1 Brownl. 45. 5 Mod. 268.

(k) Salk. 621.

4. If

4. If a Man giveth to one and his Heirs, habendum to him and his Heirs, if the Donee hath Iſſue of his Body begotten, and if he dies without Heir of his Body, that the Land ſhall revert to the Donor, (a) it is a Tail in the Donee. (b) 35 Aſſ. 14. adjudged.

(a) Where one gives Lands to one and his Heirs in the Premiſſes, he may by the Habendum ſhew and explain what Heirs he intended in the Premiſſes. 2 Rol. Abr. 66. pl. 9, 10. 68. pl. 24. which vid. and the Notes there, and vid. the Caſe of Cooper and Franklin, Cro. Jac. 400. Moor 848. pl. 1152. 1 Rol. Rep. 332, 384. Godb. 269. and 1 Brownl. 45. Palm. 136. (b) Fitz. Tail 17. S. C.

5. If a Man giveth to another and his Heirs, habendum to him and his Heirs, if he ſhall have Heirs de Carne ſua, and if he ſhall not have any Heirs de Carne, then the Land ſhall revert to the Donor and his Heirs, with a Clauſe of Warranty to the Donee and his Heirs de Carne ſua, it is a Tail, tho' the firſt Words purport a Fee, for his Intent appears by the whole Deed conjoin'd together, that he intended a Tail. (c) 37 Aſſ. 15. adjudged.

(c) Fitz. Tail 18. S. C.

5 Mod. 269. S. C. cited, Bridg. 2. S. C. cited, Cro. Jac. 476. S. C. cited, Cro. El. 526. S. C. cited.

* Fol. 839.

* 6. (d) If a Feoffment be made to A. and his Heirs, with Warranty to him and his Heirs, & ſi contingat that he dies without Heir of his Body, that it ſhall remain to B. in Fee; it is an Eſtate-tail in A. for the Limitation of the Remainder explains what Heirs of A. are intended. Mich. 5 Jac. B. R. inter (e) Watt and Waſtfield, per Curiam, adjudged.

(d) 5 Mod. 268. L.P cited.

(e) 5 Mod. 269. S. C. cited.

7. If a Man makes a Deed of Feoffment of Lands to *A.* and his Heirs, and another Deed of the ſame Lands to *A.* and the Heirs of his Body, and delivers Seiſin according to the Form and Effect of both Deeds; in this Caſe he cannot take a Fee in both, as (f) ſome hold, becauſe Livery was made upon both Deeds, and therefore others hold it ſhall enure by Moieties, *viz.* to give a Tail in one Moiety with a Fee expectant, and a Fee-ſimple in the other Moiety. *Co. Lit.* 21. *a.*

(f) 2 Rol. Rep. 23.

8. If one lets Lands to *A.* for Life, Remainder to *B.* in Tail, Remainder to *C. in forma præd.* 'tis void for the Uncertainty; but if the Remainder had been to *C. in eadem forma*, it had been a Tail. *Co. Lit.* 20. *b.*

(U) By what Words a Tail may be made by Implication.

1. A Deviſe to A. till his Heir comes to twenty-four Years of Age, and then to the Heir and his Heirs for ever, and when he comes to twenty-four, he ſhall have a third Part for Life, and if the Heir dies before twenty-four, then he ſhall have for Life; and after the Deceaſe of A. if the Heir hath not any Iſſue, Remainder to the Deviſor's Daughter, Remainder to the right Heirs of the Deviſor; the Heir comes to twenty-four, yet he hath no Tail, but Fee. Dy. 2, 3. Ma. 124. 38. adjudged.

2. If a Deviſe be to one in Tail, Remainder to another in Tail, Remainder to another in forma prædicta, this laſt Remainder hath a Tail alſo. Dubitatur. 5 H. 4. 4. Otherwiſe on a Grant. Dubitatur. 5 H. 4. 4.

3. If a Man deviſeth a Meſſuage to A. his Daughter and her Heirs, and another Meſſuage called his great Meſſuage to T. his Daughter, being of the Age of eight Years, and to her Heirs; and if ſhe dies before the Age of ſixteen Years, Alice then living, then he

he wills that his Daughter A. ſhall have the great Meſſuage to her and her Heirs; and if A. dies, having no Iſſue, T. living, then he wills that T. ſhall have and enjoy the Part of A. to her and her Heirs; and if both the ſaid Daughters A. and T. ſhall die, having no Iſſue, then he deviſeth the whole to J. S. and his Heirs. In this Caſe the Daughters have Eſtates-tail, and not a Fee on a Contingency ſubſequent. Dy. 16 El. 330. 20. (a) Clache's Caſe, per 3. verſ. 1.

(a) Bridg. 86. S. C. cited, 2 Jon. 173.

S. C. mentioned, and ſaid by Pemberton Chief Juſtice, that he had heard great Opinions, that this Caſe was not Law.

4. If a Man deviſeth Land to R. his Daughter for Life, and if ſhe marry after my Deceaſe, and have Heir of her Body, that then that Heir ſhall have it after her Death, and the Heirs of their Bodies, per eadem verba; and if ſhe happen to die without Iſſue, then I deviſe it to P. my Daughter, &c. it is an Eſtate-tail in R. and her Heir ſhall not take by Purchaſe on a Contingency. Dubitatur, Hill. 37 El. B. R. inter (b) Clarke and Davie.

(b) Clark and Day,

Cro. El. 513. S. C. adjourned, Moor 593. pl. 803. S. C. ſaid to be adjudged contra, viz. that ſhe had not an Eſtate-tail, but for Life, and that her Heir ſhould take by Purchaſe, Lilly and Taylor. Ow. 148. ſeems to be S. C. and Court divided, 2 Levinz 60. S. C. cited, 1 Vent. 226. S. C. cited.

5. If Mention be made in a Deed of the Heirs of the Body of J. and afterwards limits an Eſtate to him & hæredibus J. prædicti, it is a good Tail. 42 E. 3. 5. b.

6. If a Man deviſeth that his Land ſhall deſcend to J. his Son and Heir, and that his Executors ſhall take the Profits of them (c) till the Son dies without Iſſue; Proviſo, that if his Son dies without Iſſue, that then all the Land ſhall remain to the right Heirs and Poſterity of the Deviſor and his Name for ever, it is an Eſtate-tail in J. clearly. Mich. 12 Jac. B. inter (d) Cumbden and Clarke per Curiam.

(c) This ſeems to be miſprinted, for by the Report of the Caſe in Hobart, the Executors

were appointed to take the Profits till his Son came to twenty-four. (d) Hob. 29. S. C. adjudged, 1 Brownl. 129. S. C. but S. P. does not appear.

7. If a Copyhold be ſurrender'd to the Uſe of A. and B. his Son, and the Survivor of them, and for Want of Iſſue of the Body of B. begotten, the Land ſhall remain to J. S. In this Caſe B. hath but an Eſtate for Life, (e) it being by Act executed, not by a Will, becauſe there wants the Word (Heirs). Trin. 10 Car. B. R. inter (f) Scygood and Hone, adjudged per Curiam on a Demurrer. Intratur Mich. 8 Car. Rot. 195.

(e) That an Uſe ſhall not ariſe by Implication upon ſuch a Surren-

der, tho' it may in a Will. Vid. 1 Brownl. 127. Salk. 621. 2 Jon. 174. adjudged, 1 Jon. 342. S. C. adjudged. (f) Cro. Car. 366, 367. S. C.

8. If one having Lands in *A.* and *B.* deviſes all his Lands to his Son and his Heirs, and if he dies without Iſſue, then he deviſes his Lands in *A.* to *C.* and his Heirs. *Item*, He deviſeth his Lands in *B.* to *D.* and his Heirs, the Son hath an Eſtate-tail in the Lands in *B.* the Remainder to *D.* and his Heirs; for this is no Countermand of the Deviſe to the Son, but ſhall be conſtrued as a Deviſe to *D.* on the Failure of Iſſue of his Son. *Trin.* 8 *Jac.* between (g) *Brown* and *Jews*, *Cro. Jac.* 290. adjudged.

(g) Wallop and Darby, Yelv. 209. ſeems to be S. C. adjudged.

Fol. 840.

(X) (a) (b) Bars of Eſtate-tail.

(a) Tenant in Tail by the Statute is diſabled to bar or bind his Iſſue, unleſs by ſuch Means as the Laws and Statutes allow. Hob. 203.

1. (c) **If a Recovery be had againſt Tenant in Tail on Title found againſt him** per Pais, ſcilicet, ne dona pas, **the Iſſue is barr'd for ever, and hath no other Remedy but Attaint.** (d) 34 H. 6. 2. b. per Priſot.

(b) —— By Fine, *vide* under Title **Fines.** —— By Recovery, *vide* under Title **Recovery.** —— By Warranty, *vide* under Title **Voucher** or **Warranty.**

(c) Co. Lit. 393. b. 6 Co. 7. b.

(d) Br. Fauxifier de Recovery 4. S. C.

(e) Co. Lit. 20. a. S. P. 6 Co. 7. b.

(f) For this *vid.* Co. Lit. 361. a.

(g) Br. Fauxifier de Recovery 4. S. C.

2. (e) **But if the Recovery be by Default, or by other Special Matter, or the Iſſue doth not go to the Title of the Gift,** (f) **the Heir may falſify every ſuch Point.** (g) 34 H. 6. 2. b. per Priſot. **But there** Moyle **ſaid, that a Recovery againſt Tenant in Tail ſhall bind the Iſſue.**

3. A Recovery in a Writ of Right againſt Tenant in Tail, without a Voucher is no Bar of the Intail. *Co. Lit.* 378. *a.*

4. If Tenant in Tail, the Remainder over in Fee *Ceſſe*, and the Lord recovers in a *Ceſſavit*, this will not bar the Tail, for the Iſſue ſhall recover in a *Formedon. Co. Lit.* 373. *a.*

(Y) Tail at Common Law.

(h) Not an abſolute one, for the Courſe of Diſcent was not altered by the having of Iſſue, for if the Donee had Iſſue and died, the Lands had deſcended to his Iſſue; yet if that Iſſue (without any Alienation) had died without Iſſue, his collateral Heir ſhould not have inherited, becauſe he was not within the Form of the Gift, *viz.* Heir of the Body of the Donee. Co. Lit. 19. b. 7 Co. 34. b. 35. a. 2 Inſt. 334.

1. **When Land was given to one and the Heirs of his Body, after Iſſue he had** (h) **a Fee, becauſe then the Condition was performed.** 18 Aſſ. (i) 58. (k) 18 E. 3. 46.

(i) This is printed here as in the Original, but there are not ſo many **placita** in that Year, but I ſuppoſe it ſhould be 18 Aſſ. 5. or intended fol. 58.

(k) Fitz. Tail 16. S. C.

(Z) By whom it might be dock'd.

(l) 8 Co. 70. b. 9 Co. 140. a.

1. (l) **If Huſband and Wife were ſeiſed to them and the Heirs of their Bodies, the Huſband alone after Iſſue could not have dock'd it, but the Iſſue after his Death ſhould have had his** Cui in vita. 21 E. 3. 45. Co. Lit. 19.

(A) (a) (b) At what Time it might be dock'd.

(a) 7 Co. 34. b.
(b) Theſe Rules yet hold in Annuities, and other Things not intailable by the Statute.

1. AFter Iſſue the Donee might Bar the Iſſue by Alienation. 7 H. 4. 46. pl. 6. 18 E. 3. 56. b. Admitted by Iſſue, Co. Lit. 19.

7 Co. 35. a. Co. Lit. 19. a.

2. (c) After Iſſue he might bar the Iſſue by Forfeiture for Felony or Treaſon. 7. H. 4. 46. pl. 6. Co. Lit. 19.

(c) 2 Inſt. 334. S. P.

3 (d) If Donee in Tail at Common Law had aliened before Iſſue had, and afterwards had Iſſue, that Alienation ſhould bind him, becauſe he claimed a Fee. Co. Lit. 19.

(d) 7 Co. 35. a. 2 Inſt. 333.

4. But in that Caſe, if the Iſſue died without Iſſue, that Alienation ſhould not bar the Donor, but he might re-enter, becauſe at the Time of the Alienation he had not Power to bar the Poſſibility of the Donor. Co. Lit. 19.

5. (e) If Lands had been given to the King and the Heirs of his Body, he could not before Iſſue have aliened, but only to bar his Iſſue (as a common Perſon might have done) but not to have barred the Reverſion, which would have been a Wrong in the Caſe of a Subject, and the King's Prerogative cannot alter or inlarge what the Donor gave him. *Co. Lit.* 19. *b.*

(e) 1 Co. 44. b.

6. If the King before the Statute *de donis Conditionalibus* had made a Gift to one and the Heirs of his Body, the Donee *poſt prolem ſuſcitatam* might have aliened, (f) as well as in the Caſe of a common Perſon. *Co. Lit.* 19. *a. b.*

(f) Not to bar the Reverter in the Crown. 9 Co. 132. b.

Frankmarriage.

(B) (g) How it may be created.

(g) By Gift to one habendum in liberum, &c. cum filia of the Donor. Co. Lit. 21. a.

1. IT may be created without Deed. 39 H. 6. 30. b.
2. It may be created by this Word Frankmarriage, without the Words Heirs of the Body, &c. 20 H. 6. 36. b.

Cro. Jac. 434. and vid. Godb. 19. Ow. 26.

By what (h) Words.

(h) By the Words In liberum Maritagium an Eſtate of Inheritance in Special Tail is created. Co. Lit. 21. a.

3. (i) If a Man gives Land with his Couſin in Frankmarriage, rendring Rent, this Reſervation is void, becauſe it cannot ſtand with the Eſtate to render any Rent before four Degrees paſſed, and ſo good Frankmarriage. (k) 4 H. 6. 22. Contra 26 Aſſ. 66. adjudged, a Rent and Knight-Service reſerved.

(i) Co. Lit. 21. b. S. P. Godb. 19. S. P. arguendo.
(k) Br. Frankmarriage 3. S. C. Br. Reſervation 13. S. C.

(a) Moor 643. pl. 888. L. P. Web and Potter, L. P. Owen 26. Godb. 19.

4. (a) If a Gift be in Frankmarriage to Huſband and Wife, habendum to them and their Heirs in Fee, (b) the Frankmarriage is deſtroyed, and they have an Eſtate in Fee, Demurrer. 10 H. 6. 16.

(b) So if the Remainder in Fee be limited to a Stranger, becauſe then they cannot hold of the Donor. Co. Lit. 21. b. 9 Co. 14. a. 10 Co. 117. b. —— Otherwiſe where Remainder in Tail, reſerving Reverſion to Donor. Co. Lit. 21. b. Godb. 20. Ow. 26.

(c) But vid. Godb. 19. Ow. 26.

5. The Gift muſt be in Conſideration of Marriage either to a Man with a Woman, or (c) as ſome ſay to a Woman with a Man. *Co. Lit.* 21. *b.*

6. The Woman or Man that is the Cauſe of the Gift muſt be of the Blood of the Donor. *Co. Lit.* 21. *b.*

(d) Godb. 19. Ow. 26.

7. Such Gift may be made as well (d) after Marriage as before. *Co. Lit.* 21. *b.*

(e) Godb. 18. S. C. adjudged, Moor 643. S. C. cited.

8. If one gives Lands in Frankmarriage, and the Words of the Deed are, *Dedi & Conceſſi* J. W. *in liberum maritagium* Johannæ *filiæ meæ*, this is good, tho' according to the uſual Form it ſhould be *cum* Johanna *filia mea*. 25 *Eliz.* between (e) *Web* and *Potter*, *Ow.* 26. adjudged *per totam Curiam.*

Fol. 841.

(*) Where a Deviſe to one and the Heirs Male of her Body, provided ſhe marries and hath Iſſue by one ſurnamed Searl, is a Special Intail, &c. Salk. 570.

Tail (*) Special.

(C) By what Words.

1. If Land be given to Huſband and Wife, and to the Heirs of their two Bodies, and if the Huſband dies without Heir of the Body of the Wife, the Remainder to a Stranger, it is a Special Tail in the Wife, inaſmuch as it was expreſly limited to her before. 30 E. 3. 18. b.

2. But if a Gift be to the Huſband and his Heirs of the Body of his Wife begotten, and if the Huſband and Wife ſhall die without Heirs of their Bodies, the Remainder to another; yet it ſeems the Wife hath not any Eſtate by this Implication againſt the expreſs Limitation before. 30 E. 3. 18. b.

Tail at Common Law.

(D) Deſcent.

(f) 8 Co. 36 a. S. P.

(g) Fitz. Tail 16. S. C.

(h) 8 Co. 35. b. L. P.

(i) Fitz. Tail 16. S. C.

1. (f) If Land at Common Law had been given to one, and to the Heirs of his Body, the collateral Heirs, who were not of the Body of the Donee, ſhould never inherit, altho' the Donee had Iſſue before his Death. (g) 18 E. 3. 46. 18 Aſſ. 58. Co. Lit. 19.

2. (h) If Land had been given to one and his Heirs Male of his Body, and afterwards he had Iſſue a Male and a Female, and afterwards the Male died, the Female ſhould inherit the Land. (i) 18 E. 3. 46. 18 Aſſ. 58. contra Co. Lit. 19.

3. If Lands had been given to Husband and Wife, and the Heirs of their two Bodies, and they had Iſſue, and the Husband had died, and ſhe had

had married again and had Iſſue, on Failure of the former Iſſue this Iſſue (a) might have inherited. 8 *Co.* 35. *b.*

(a) But now vid. Stat. 13 Ed. 1. cap. 1.

Tail.

(E) Deſcent of it.

1. (b) IF an Eſtate be given to one for Life, Remainder to the right Heirs of the Body of J. S. if the Tail attached on the Son of J. S. and he enter'd after the Death of the Leſſee, and died without Iſſue, the two Brothers ſhall not have the Land by Force of the Tail, becauſe the Elder was Purchaſor. Dy. 4, 5 Mar. 156, 25.

(b) But where Lands were given to a Widow, and to the Heirs of her Body by her late Husband, the Tail veſted in the Son, and upon his Death without Iſſue, it was ſaid the Daughter by the ſame Husband might *per formam doni* intitle her ſelf. Co. Lit. 26. b. —— It is certain, that in ſome Caſes one may have the Lands *per formam doni* that is not Heir of the Body of the Donee. Co. Lit. 20. a. 220. a. but *vid.* 1 Rep. 104. a. Cro. Car. 24. 1 Mod. 238. 2 Leon. 25, 26, 27.

2. In the Caſe of (c) Littleton, of a Gift to the Son and the Heirs of the Body of his Father; it ſeems the ſecond Brother ſhall not inherit the Tail. Dy. 4, 5 Ma. 156, 25. quære.

(c) Littl. Sect. 30.

3. (d) If a Deviſe be to one and his Heirs Male of his Body, if the Donee hath Iſſue a Daughter, who hath Iſſue a Son, the Son ſhall not have the Land, for the Deviſe doth not extend further than to ſettle the Eſtate, and not to direct the Deſcent. (e) 9 H. 6. 23. b. (f) 11 H. 6. 12. b.

(d) Co. Lit. 25. a. S. P. and the Caſe, Title Deviſe 18. to the contrary denied to be Law; for tho' by Deviſe an Inheritance may be created by other Words than by Gift, yet cannot a Deviſe direct an Inheritance to deſcend againſt the Rules of Law; and *vid.* 1 Rep. 85. b. Hob. 32, 33. S. P. and the Opinions in H. 6. and Fitz. Title Deviſe 18. to the contrary denied. (e) Fitz. Deviſe 2. S. C. Br. Deviſe 5. S. C. (f) Br. Deviſe 32. S. C.

(F) What (g) Charge made by Tenant in Tail ſhall bind the Iſſue.

(g) Where before the Statute *de donis* he might have charged the Lands with a Rent common, &c. 2 Inſt. 334. Co. Lit. 19. a.

1. IF Tenant in Tail acknowledgeth a Tenure of the King (h) by Eſtoppel, yet the Iſſue ſhall avoid it by the Statute, nec per Factum, &c. (i) 1 H. 4. 5.

— But cannot ſince. 2 Inſt. 335. (h) Where the Iſſue in Tail ſhall not be bound by Eſtoppel of the Anceſtor. 1 Rol. Abr. 875. (i) 1 Rol. Abr. 875. pl. 1. S. C.

2. If Tenant in Tail chargeth the Land, the Iſſue may defeat it. 38 E. 3. 23. b.

3. If Tenant in Tail granteth Eſtovers to another, it is void by his Death. (k) 38 E. 3. 23. b.

(k) Br. Entry Congeable 77. S. C. Br. Recognizance 7. S. C.

* 4. If Tenant in Tail acknowledgeth a Statute or Recognizance on which the intailed Land is extended, the Iſſue after his Death may ouſt him. 38 E. 3. 23. b. 18. b. admitted by Iſſue 38 Aſſ. 5. adjudged.

* Fol. 842.

(a) So is the Original.

5. If Tenant in Tail grants the (a) Veſture of his Woods, and dies, the Grantee cannot cut the Wood afterwards; contra 38 E. 3. 24.

6. If Tenant in Tail forfeits the double Value of the Marriage, and dies, the Lord ſhall retain the Land till it be levied againſt the Iſſue. 1 H. 4. 5. b.

(G) (b) What Charges made by Tenant in Tail ſhall bind the Iſſue.

(b) My firſt Part 780. A. 1, 2, &c.

(c) Co. Lit. 343. b. S. P. 1 And. 288. S. P. 2 Bulſt. 43.

1. (c) If Tenant in Tail grants a Rent to him who hath Right to the Land for a Releaſe of his Right, it ſhall bind the Iſſue, becauſe the Iſſue hath (d) Advantage by the Releaſe. (e) 44 E. 3. Octa. Lumb. 22. Com. 436. b.

(d) If there be a Giſt in Tail, upon Condition, that the Donee, &c. may alien for the Profit of his Iſſue, it is good. Co. Lit. 224. b. S. C. cited. (e) Fitz. Charge 7. S. C. 1 Co. 94. b. S. C. cited, 2 Brownl. 67. S. C. cited, 10 Co. 37. b.

(f) Pl. Com. 466. a. b. this Point debated.

2. (f) So if the Rent be granted by Tenant in Tail to him who pretends Title to the Land, it ſhall bind the Iſſue. 8 H. 6. 23.

(g) Noy 80. S. P.

3. (g) If a Man deviſeth Land to J. S. and his Heirs, on Condition that he ſhall grant a Rent in Fee to J. D. and that if J. S the Donee dies without Iſſue, that the Land ſhall remain to a Stranger, and dies, and J. S. grants the Rent accordingly, and dies; this Grant ſhall bind the Iſſue, becauſe it was not againſt the Will of the Teſtator, but with his Will, and it was granted for the Preſervation of the whole Eſtate, for if it had not been done, the Condition had been broken. And the Donee did not make this Grant meerly by Force of his Intereſt, but alſo by Force of an Authority given by the Deviſor. And ſome ſay that the Donee is ſeiſed in Fee till the Rent granted, and afterwards is Tenant in Tail by this Deviſe, foraſmuch as it doth not limit a Tail at firſt but a Fee. Mich. 15 Jac. B. R. inter (h) Dutton and Ingham, per totam Curiam.

(h) Cro. Jac. 427. S. C. adjudged, Poph. 131. S. C. adjudged, 5 Mod. 267. S. C. cited. My firſt Part 780. pl. 1. S. C.

4. So if a Deviſe be made to another in Tail, on Condition that he ſhall grant a Rent in Fee, and he doth it accordingly, and dies, his Iſſue ſhall hold it charged with the Rent for the Reaſon aforeſaid, for it is mixed with the Authority of the Deviſor. Mich. 15 Jac. B. R. inter (i) Dutton and Ingham, per Curiam.

(i) Cro. Jac. 427. S. C. Poph. 131. S. C. My firſt Part 780. pl. 1, 2, &c.

5. If Tenant in Tail aſſigns a Rent out of the Land to a Woman that is intitled to Dower thereof, not exceeding the yearly Value of her Dower, and dies, this ſhall bind his Iſſue. *Paſch.* 34 *Eliz.* between *Bickley* and *Bickley*, 1 *And.* 287, 288. reſolved by two Judges.

(H) What Charges made by Tenant in Tail ſhall be void as to one, and not againſt another, as the Iſſue, (a) and thoſe who claim under the Tail.

(a) In the Original it is en, and I ſuppoſe miſprinted there

1. IF the King giveth in Tail, and afterwards the Donee leaſeth for Years, rendring Rent, and dies, his Iſſue of full Age, and this is found by Office, this Leaſe is not of Effect againſt the King, for he ſhall have primer Seiſin as of Land in Poſſeſſion, and yet it is not void againſt the Iſſue, but that after Livery ſued, the Iſſue by Acceptance of Rent will make it good. Co. Lit. 46. cites (b) Auſtin's Caſe, P. 2, 3 Ph. & Mar. to be adjudged in the Exchequer.

(b) 7 Co. 8. b. S. C. cited.

2. If Tenant in Tail leaſeth for Years, rendring Rent, and afterwards takes Wife, and dies without Iſſue, now as to him in Reverſion the Leaſe is meerly void; but if he endows the Wife of the Tenant in Tail of the Land, now as to her who is in of the Eſtate of her Husband, it is a good Leaſe, and revived. Co. Lit. 46.

3. (c) So if Tenant in Tail leaſeth for Years, reſerving Rent, and afterwards dies without Iſſue, his Wife priviment enſeint, and he in Reverſion enters, the Leaſe is void againſt him; but after the Iſſue is born, the Leaſe is good againſt him, if it be made according to the Statute, and otherwiſe voidable. Co. Lit. 46.

(c) 7 Co. 8. b. S. P.

4 (d) If Tenant in Tail leaſeth for Years, to commence ten Years after, reſerving Rent; Tenant in Tail dies, the Iſſue enters and makes a Feoffment, and afterwards the ten Years expire, and afterwards the Leſſee enters, if the Feoffee accepts the Rent of the Leſſee, the Leaſe is made good; for it cannot be certainly known, whether the Iſſue avoided it, or not, by his Entry, and therefore it ſhall be at the Election of the Feoffee to make it good, or not. (e) Co. Lit. 46. b. (Quære it) Vide Com. 437.

(d) Dyee and Thomaſins, L. P. 1 Sid. 261. held by all the Judges except Twiſden, 1 Lev. 167. adjourned, Raym. 132, 134. adjourned, 1 Keb. 778, 910. adjourned, Carth. 261. cited, and ſaid by Juſtice Dolben, that this Caſe was miſreported by Siderfin, for that no Judgment was given therein, 4 Mod. 6. cited, and ſaid by Dolben, that the Caſe was neither well ſtated or well reported by Siderfin, and vid. as ſtated in 4 Mod. 1. Show. 378.

(e) 1 Rol. Abr. 831. pl. 2. S. C. Salk. 338. S. C. cited, and denied to be Law by Eyres, Gregory and Dolben, Carth. 260. cited, and held by the Chief Juſtice to be good Law, tho' the other three Juſtices doubted, 1 Show. 378. S. C. cited.

5. If Tenant in Tail before the Statute 27 *H.* 8. had made a Feoffment in Fee to the Uſe of himſelf and his Heirs, and he and his Feoffees had made a Leaſe for Years, rendring Rent, and after the Statute, Tenant in Tail had died ſeiſed, and his Iſſue before any Entry or Acceptance of the Rent had aliened by Fine, his Alienee ſhould not have avoided this Leaſe, for it was not meerly void by the Death of Tenant in Tail without an actual Entry made by the Iſſue. (f) *Mich.* 33 *H.* 8. reſolved by the better Opinion of both Courts, except *Saunders*.

(f) 7 Co. 9. a. S. C. cited, 2 Bulſt. 44.

S. C. cited, 4 Mod. 5. S. C. cited.

6. If a Woman being Tenant in Tail leaſes for thirty-one Years and then marries, and they have Iſſue, and the Wife dies, the Husband being Tenant by the Curteſy, ſhall not avoid this Leaſe; and if he ſurrenders to the Iſſue in Tail, he ſhall not avoid it during the Life of the Husband. 6 *El.* (g) *Putterel's* Caſe, *Dal.* 65. *pl.* 28.

(g) 1 Leon. 200. S. C. adjudged, Ow. 83. S. C. adjudged, Moor 8. pl. 30. S. C. con.

7. If

7. If *A.* and *B.* his Wife are Tenants in Tail, the Reverſion in *A.* in Fee, and *A.* dies, and his Son and Heir being the Iſſue in Tail, makes a Leaſe for forty Years, to begin after the Death of *B.* rendring an yearly Rent, and dies, and afterwards the then Heir and Iſſue in Tail levies a Fine, the Conuſee ſhall not avoid this Leaſe. *Mich.* 10 *Jac.* between (a) *Erington* and *Erington*, 2 *Bulſt.* 42, 43, *&c.* ſeems the better Opinion, tho' no Judgment.

(a) 4 Mod. 3. S. C. cited, and ſaid the Leaſe was good againſt him as well by Eſtoppel as Intereſt out of the Reverſion in Fee. 1 Show. 384.

8. If Tenant in Tail acknowledges a Recognizance for 1000 *l.* and dies, and a *Scire facias* is brought againſt the Iſſue in Tail, pending which he makes a Leaſe for Years, and pleads to the *Scire facias Riens per Deſcent*, which is found againſt him; now as the Iſſue is bound by this Verdict, ſo is his Leſſee, and he cannot falſify, there being no Covin. *Mich.* 14 *Jac.* between (b) *Crawley* and *Marrow*, 3 *Bulſt.* 245. adjudged.

(b) Bridg. 64. S. C. adjudged, and more fully and plainly ſtated. 1 Rol. Rep. 424, 443. S. C. adjudged, where it is ſaid, that it was found he had theſe Lands by Diſcent in Fee, upon which Judgment was given they ſhould be ſubject to the Extent. Vide 1 Rol. Abr. 876. pl. 4.

9. If Tenant in Tail grants a Rent-charge, and after makes a Leaſe warranted by the Statute, and dies, the Eſtate of (c) the Leſſee ſhall be ſubject to the Rent-charge. *Hill.* 21 *Jac.* in the Caſe of (d) *Croker* and *Kelſy*, 2 *Rol. Rep.* 489. agreed by two Judges.

(c) The Feoffees of Tenant in Tail, and all that come to the Land under Tenant in Tail, by any Aſſurance made by him whereby the Tail is barred or diſcontinued, and tho' not barred or diſcontinued (except the Iſſue in Tail, who is help'd by the Statute) ſhall hold the Eſtate charged with the Leaſes and Charges made by Tenant in Tail. 1 Show. 377, 385. N. Dyer 51. b. Margin. My firſt Part 781, 782. pl. 10, 11, &c. (d) Bridg. 28. S. C. and S. P. and vid. 1 Mod. 110.

10. If *A.* is Tenant in Tail in Remainder after a Leaſe for Years, Remainder to *A.* in Fee, and *A.* makes a Leaſe to begin at a Day to come, and dies before the Day, and his Iſſue levies a Fine, the Conuſee ſhall be charged with this Leaſe; for the Tail by the Statute being made as a particular Eſtate, is extinct and merged, being united with the abſolute Fee. *Hill.* 5 *Will.* between (e) *Symonds* and *Cudmore*, *Salk.* 338. adjudged.

(e) Carth. 257, &c. S.C. adjudged, 4 Mod. 1, &c. S. C. adjudged, 1 Show. 370, &c. a long Argument upon the Caſe.

11. (f) *A.* is Tenant in Tail, (g) Remainder to the King in Fee, and *A.* makes a Leaſe for Years, and is after attainted of Treaſon, by this the Tail is merged, and as much gone as if Tenant in Tail was dead without Iſſue. In the Caſe of *Symonds* and *Cudmore*, *Salk.* 338. ſaid.

(f) Dyer 107. pl. 26. S. P. made a Quære. Dyer 115. pl. 65.

(g) Otherwiſe if the Remainder had not been in the King. 1 Show. 377.

Fol. 843.

(I) (h) What Charges made by Tenant in Tail ſhall be void by his Death, and what only voidable, and who ſhall avoid.

(h) For the general Rules in this Caſe, vid. 1 Show. 373, 374.

1. (i) IF Tenant in Tail of a Manor to which an Advowſon is appendant, grants the next Avoidance of the Advowſon, and dies, and the Iſſue enters into the Manor, (k) the Grant is void,

(i) Brownl. 161. S. P. and vid. 1 Bulſt. 31, &c. 35. My ſecond Part 672. pl. 6. by him when he had nothing.

(k) So if his Son and Heir had joined, becauſe it could be no Confirmation My ſecond Part 140. S. 2.

becauſe it is a Thing which lies in Grant, whereof no Formedon lies, and no Rent is reſerved thereon. Paſch. 13 Jac. B. R. (a) inter Bowles and Walter. Such Judgment given in Banco, affirmed in a Writ of Erroꝛ.

(a) 1 Rol. Rep. 190. S. C. 1 Bulſt. 31, &c. S. C. at large.

2. If Tenant in Tail leaſeth foꝛ Years to commence at Michaelmas next following, rendring Rent, and dies beforꝛe Michaelmas, and the Iſſue enters into the Reſidue of the Land deſcended; yet he may make this Leaſe good by Acceptance of Rent after Michaelmas, becauſe his Election was not come beforꝛe. (b) Paſch. 13 Jac. B. R. by Coke ſaid to be ſo adjudged in Banco.

(b) 1 Rol. Rep. 190. S. C. and S. P. per Coke, 1 Show. 384. S. C. cited.

3. (c) If Huſband and Wife ſeiſed in Tail to the Heirs of their Bodies begotten, the Remainder to the right Heirs of the Huſband, and afterwards the Huſband dies, and the Iſſue of their Bodies levies a Fine to J. S. in the Life of the Wife, and afterwards the Wife make a Leaſe foꝛ thirty Years, rendring Rent, and dies, the Conuſee ſhall not avoid this Leaſe at Common Law, foꝛ the Eſtate-tail is barr'd by the Fine; and the Leaſe is good being made by the Wife when ſhe was Tenant in Tail, and ſo not void againſt the Iſſue if no Fine had been levied; and now the Fine hath barr'd the Iſſue and the Intail, and the Conuſee doth not come in in Privity of the Tail, but is a Stranger to it, and therefoꝛe he cannot avoid it, and therefoꝛe the Leaſe is good as long as there is any Iſſue of their Bodies. Hill. 22 Jac. B. R. inter (d) Croker and Kelſey, per Curiam, adjudged on a Special Verdict, and afterwards affirmed in a Writ of Erroꝛ in the Exchequer-Chamber, without any Doubt; but the Doubt of the Caſe was, whether it was void by the Statute of 11 H. 7. it being the Jointure of the Wife.

(c) Skin. 31, 36. S. P. adjudged.

(d) Cro. Jac. 688, 689. S. C. adjudged; 1 Jon. 60, 61. S. C. adjudged, 2 Rol. Rep. 490, 491, 498. S. C. adjudged, Bridg. 27. S. C. adjudged, Hut. 84. S. C. adjudged, but the Report of this Caſe in the ſeveral Books varies; in moſt of them it appears, that the Fine was levied to the Uſe of the Conuſor and his Heirs, and he deviſed to J. S. who came not in Privity to avoid the Leaſe; but where in Bridg. it is ſaid the Mother joined with the Iſſue in Tail, it appears the Book is miſ-printed. Skin. 31. S. C. cited, and ſaid that the Reſolution of this Caſe went very far, and perhaps if to be adjudged at that Day it would have been contrary. 1 Sid. 62, 63. S. C. cited, and much illuſtrated.

4. After the Statute of *Weſtm.* 2. *c.* 1. *de donis conditionalibus*, the Judges conſtrued the Words *Non habeant illi quibus tenementum ſic fuerit datum ſub conditione poteſtatem alienandi*, &c. according to the Rule and Reaſon of the Common Law, as in the Caſe of a Biſhop, Abbot, &c. or Baron ſeiſed in the Right of his Wife. 3 *Rep.* 85. *b.*

5. Therefore the Feoffment of Tenant in Tail makes a Diſcontinuance voidable by Action only. 3 *Rep.* 85. *b.*

6. But if Tenant in Tail of a Rent, or other Thing that lies in Grant, grants it in Fee, and dies, it is no Diſcontinuance, but by the Iſſue voidable (e) by Claim or Action. 3 *Rep.* 85. *b.*

(e) And is not beforꝛe determined. Far. 24. Carth. 260.

7. (f) But if Tenant in Tail of Land grants a Rent out of it, by his Death it is abſolutely determined. 3 *Rep.* 85. *b.*

(f) Dyer 51. b. S. P.

8. If *A.* Tenant in Tail, covenants to ſtand ſeiſed to the Uſe of himſelf (g) for Life, Remainder to his eldeſt Son in Tail, this alters not the Eſtate of *A.* for the Uſe to the Son to commence after the Death of *A.* is (h) void. *Paſch.* 34 *Eliz.* between (i) *Blithman* and *Blithman*, 1 *And.*

(g) But if he had covenanted to ſtand ſeiſed to the Uſe of himſelf foꝛ ninety-nine Years, if he lived ſo long, Remainder to his eldeſt Son, the Remainder would have been good, and veſted in him. 2 Lev. 84.

(h) And the Covenantoꝛ continues Tenant in Tail, and may bar it by a Recovery with ſingle Voucher. Freſhwater and Rous, Moor 683. pl. 940. 1 Brownl. 193. Yelv. 51. Bedingfield's Caſe. Cro. El. 895. Noy 46. Machil and Clerk. Far. 18, 19, &c. Salk. 619, and vid. Moor 32. pl. 105. Noy 46. Lit. Rep. 122.

(i) Cro. El. 279. S. C. adjudged, Moor 345. S. C. cited, 2 Rep. 52. S. C. cited.

291. adjudged, and that the Wife which the Covenantor after married ſhould not be endowed.

9. If Tenant in Tail makes a Leaſe for Years, without reſerving any Rent; yet this Leaſe is not void, but voidable only by the Iſſue by the Statute *de donis. Trin.* 17 *Car.* 2. between (a) *Opee* and *Thomaſius*, 1 *Sid.* 261. reſolved *per Curiam.*

(a) Raym. 132, 134. S. C. 1 Levinz 167. S. C. 1 Keb. 778, 910.

10. (b) If Tenant in Tail makes a future Leaſe for Years, which by Poſſibility may commence during the Life of Tenant in Tail, it is not void, but voidable as to the Iſſue. *Trin.* 1 *Ann.* between (c) *Machil* and *Clark*, *Salk.* 620. *per Holt* Ch. Juſt. delivering the Opinion of the Court.

(b) Symonds and Cudmore S. P. Carth. 258. 1 Show. 379.
(c) Far. 26. S. C. and S. P.

11. (d) But if he makes a future Leaſe to commence after his Death, it is meerly void, the Title of the Iſſue then beginning. Between (e) *Machil* and *Clerk*, *Salk.* 620. *per Holt* Ch. Juſt. delivering the Opinion of the Court.

(d) Symonds and Cudmore S. P. Carth. 258. reſolved. 1 Show. 379. and vid. Cro. Jac. 455. 1 Sid. 261.

(e) Far. 26. S. C. and S. P. becauſe to commence at a Time when the Right of the Eſtate out of which it ſhould iſſue is in another by Title paramount.

12. (f) If Tenant in Tail covenants to ſtand ſeiſed to the Uſe of *A.* and his Heirs, or to the Uſe of *A.* for Life, Remainder to *B.* in Fee, this puts the Eſtate-tail out of the Covenantor. *Salk.* 620. *per Holt* Ch. Juſt.

(f) Far. 27, 28. S. P.

13. (g) But if Tenant in Tail (h) covenants to ſtand ſeiſed to the Uſe of *A.* and his Heirs after his Death, it is void. *Salk.* 620. *per Holt* Ch. Juſt.

(g) Far. 26. S. P.

(h) But if Tenant in Tail makes a Leaſe and Releaſe to the Uſe of himſelf for Life, Remainder to another, this Remainder is good 'till avoided, tho' to commence after Death of Tenant in Tail, becauſe it iſſues out of the Eſtate conveyed by Leaſe and Releaſe. Far. 28.

14. If Tenant in Tail bargains and ſells to another and his Heirs, the Bargainee hath a Fee to continue till avoided by the Iſſue in Tail, according to (i) *Seymor's* Caſe 10 *Co.* and (k) other Caſes, tho' contrary to (l) *Lit.* and to the Caſe of (m) *Tooke* and *Glaſcock*, 1 *Saund.* 260. *Trin.* 1 *Ann.* in the Caſe of *Machil* and *Clerk*, *Salk.* 620. *Far.* 27. *per Holt.*

(i) 10 Co. 96. a.
(k) Pl. Com. 557.
(l) And to Coke's Comment thereupon. Co. Lit. 345. a. but 3 Co. 84. it is ſaid, that Littleton did not intend that the Grantee had but an Eſtate for the Life of the Grantor, and that it ſhould be abſolutely determined by his Death; but that it was no Diſcontinuance, and the Grantee had no certain Eſtate longer than for the Life of the Tenant in Tail the Grantor, and vid. Hob. 338, 339.
(m) Carr. 208, 209, &c. S. C.

(K) What Perſon may be a Leſſee.

1. IF a Leaſe is granted to a Corporation aggregate for their Lives, it is not an Eſtate for Life but a Fee, for they never die. 21 E. 4. 76. (n) Contra 11 H. 7. 12.

(n) Br. Eſtates 90. S. C.

2. But a Corporation aggregate may be Leſſee for the Life of the Leſſor. 21 E. 4. 76.

Eſtate for Life by Deviſe.

(L) In whom an Eſtate for Life ſhall be ſaid to be raiſed by Implication.

1. IF a Man deviſeth Land to his Daughter in Tail, with divers Remainders over; Proviſo, That if his Daughter and every one in Remainder permits and ſuffers T. who now occupies the Land, to enjoy it during his Life; it will not give any Eſtate for Life to T. becauſe he deviſeth that he ſhould be only permitted to enjoy it on a Pain. Mich. 37 El. B. Thomas's Caſe, per Curiam, altho' the Proviſo is alſo idle, the Daughter being Heir at Common Law, and ſo is to have Advantage of it, if it be a Condition.

2. If a Man deviſeth Land whereof he is ſeiſed in Fee to his Son and Heir, after the Death of A. the Deviſor's Wife, it ſhall raiſe an Eſtate to A. for Life, becauſe the Deviſor hath ſhewn his Intention, that his Heir ſhall not have it during the Life of his Wife, where if it had not been (a) for the Deviſe, he ought to have it immediately on his Death. (b) 13 H. 7. 17. b.

(a) In the Original it is Per.

(b) Br. Deviſe 52. S. C. Cro. Jac. 75. S. C. cited, and a Diverſity taken where the Deviſe is made to the Heir after the Death of his Wife, and where made to a Stranger, ſo that there is no neceſſary Implication that the Wife ſhould have it for Life. **Smartle** and **Williams**, 2 Lev. 207. 2 Jon. 98. 1 Vent. 323. 3 Keb. 816, 832. adjudged accordingly, and vid. Moor 853. pl. 1164. 1 Vent. 376. Raym. 453, 454. Cro. El. 15. Moor 7. pl. 24. Moor 123. pl. 269. Hob. 32. 2 Keb. 300. Vaugh. 263, 264.

* 3. If Leſſee for Years, on Condition not to deviſe it to any but his Sons and Daughters, deviſeth that C. his Son ſhall have it after the Death of the Deviſor's Wife, (c) this doth not give any Eſtate to the Wife by Implication, becauſe the Son to whom it is deviſed is not to have it by Law without the Deviſe, and therefore the Life of the Wife is only a Limitation of the Time when the Son ſhall have it from the Executor, who is to have it in the mean Time. Trin. 3 Jac. B. R. inter (d) Burton and Horton, by Three againſt Two: Note, That in this Caſe alſo, if it ſhould be a Deviſe to the Wife by Implication, it would be a Forfeiture by Implication.

* Fol. 844.

(c) But where ſhe is made Executrix, ſhe as ſuch ſhall have it for Life. Moor 635. pl. 871.

(d) **Horton** and **Horton** S. C. Cro. Jac. 75. adjourned, there being Three Judges againſt One.

4. If a Man deviſeth a Term to his Son after the Death of the Wife of the Deviſor, it will not raiſe any Eſtate to the Wife, becauſe it doth not appear that his Intent was ſo, inaſmuch as the Son ſhould not have it by the Law, by the Death of the Deviſor without any Deviſe, but the Executor. Trin. 3 Jac. B. R. (e) in the ſaid Caſe of Burton, held by Three.

(e) Cro. Jac. 75. S. C.

5. (f) If a Man deviſeth Land to J. S. and his Heirs after the Death of J. D. or after twenty Years, and dies during the Life of J. D. or during the twenty Years, the Land ſhall (g) deſcend to the Heir of the Deviſor; for during that Time the Deviſor hath made no Diſpoſition of the Eſtate, but it is left to the Law. Paſch. 40 El. B. R. inter Redinge and Stoner adjudged.

(f) Dal. 5. L. P. adjudged, Moor 7. pl. 24.

(g) So if one Deviſe that his eldeſt Son, with his Executors, ſhall take the Profits till his youngeſt Son comes to twenty-two, and that then the youngeſt ſhall have it, the eldeſt hath a Fee in the mean Time. 1 Leon. 101.

6. If

6. If one poſſeſſed of a Term for Years deviſes to his Wife for Life, and after her Death to *B.* and *C.* his two Sons, and if they have no Sons, to them equally and jointly; and if they both have Men Children, that then it ſhall be for the Uſe and Profit of both their Sons jointly, or one of them, if they both have not Men Children; but if they have no Iſſue Male after the Death of his Sons, gives it to *J. S.* and the Wife dies, and *B.* and *C.* enter, and then *B.* hath a Son, he may enter in the Life of *B.* and *C.* for the Intention of the Teſtator was, that his Sons ſhould not have it if they had a Son; and his Care was for his Grandchildren rather than his Children. *Hill.* 3 *Jac.* between (a) *Blandford* and *Blandford*, *Cro. Jac.* 394. adjudged.

(a) Moor 846. pl. 1146. S.C. adjudged,

the Deviſe to the Sons being, If they had no Iſſue Male, and if they had, then, &c. 1 Rol. Rep. 318, &c. adjudged, no Time being limited when the Sons ſhould take; and therefore if any other Sons are born, they ſhall take jointly with this. Godb. 266. S. C. adjudged, the Deviſe being ſaid to be to the two Sons for their Lives, if they had not Iſſue Male, and if they had, &c. 3 Bulſt. 98, 99. fully debated and adjudged.

7. If one deviſes to his Wife 600*l.* to be paid to *J. S.* for the Lands he purchaſed of him, and are already ſettled on his Wife for her Life for Part of her Jointure, and the Lands were not ſettled, this is a (b) Miſtake in the Teſtator, and (c) ſhall not by Implication amount to a Deviſe of them to his Wife for her Life, it not appearing that he intended to paſs theſe Lands by his Will. *Hill.* 3 & 4 *Jac.* 2. between (d) *Wright* and *Wivell*, 3 *Lev.* 259. adjudged *per Pollexfen* Ch. Juſt. *Rookeby* and *Ventris*, contra *Powell*, who held ſhe ſhould take them by the Will, rather than the Intention of the Teſtator ſhould be fruſtrate.

(b) My ſecond Part 519. pl. 10, 11.

(c) But where one covenants to levy a Fine to certain Uſes, and he, reciting the Deed, deviſes and confirms all Eſtates given and granted to his Son, according to the Deed; this will paſs ſuch Lands and ſuch Eſtates as were intended to be conveyed by the Deed and Fine. Milford and Smith, Salk. 225. adjudged, 4 Mod. 131. adjudged, 1 Show. 350. adjudged.

(d) 2 Vent. 56. S. C. adjudged, againſt the Opinion of Powell, who relied on a Caſe. Moor 31. where one ſaid in his Will, That he had made a Leaſe to J. S. and had not, and yet held a good Leaſe by the Will; but it was ſaid that Caſe was of little Authority, it not appearing how the Matter came in queſtion. Vide Cro. Jac. 145.

8. If one deviſes the Rents and Profits of his Lands to his Siſter, the Wife of *J. S.* during her Life, to be paid by his Executors, this is a Deviſe to the Executors by Implication of Law, otherwiſe the Will cannot be performed. *Trin.* 8 *Will.* between (e) *South* and *Allen*, *Comb.* 375. adjudged for the Defendant accordingly, againſt the Opinion of *Holt* Ch. Juſt. (f) who ſaid, That a Deviſe of the Rents and Profits was a Deviſe of the Land, and the ſubſequent Words, *To be paid*, &c. were void.

(e) Buſh and Allen, 5 Mod. 63. South and Allen 101. and Salk. 228.

all ſeem to be S. C. and ſay, that Judgment was given for the Defendant by the other Judges againſt Holt, but there is a Variance in the Books, what was the Opinion of Holt, and what of the other Judges; and tho' by all it is ſaid, Judgment was given for the Defendant; and it appears by the Record 5 Mod. 98. that the Ejectment was brought on the Demiſe of J. S. and his Wife.

(f) That a Deviſe of the Profits is a Deviſe of the Lands, unleſs the Intention be plainly otherwiſe. Vide my ſecond Part 526. pl. 10. among the Notes there. Bridg. 107.

(M) Eſtate for Life or otherwiſe.

Deviſe.

1. (g) **If a Man deviſeth in this Manner,** I deviſe Black-acre to my Daughter *F.* and to the Heirs of her Body begotten. *Item*, I deviſe unto my ſaid Daughter White-acre, **the Daughter ſhall have**

(g) Godb. 146. L. P. and vid. Dal. 50. pl. 15.

Moor 52. pl. 151. Cro. Car. 369. 2 Lev. 91. 1 Sid. 105. 1 Mod. 100. Cro. Jac. 190. Yelv. 210. 1 Rol. Rep. 368, 369. Salk. 235.

but an Eſtate for Life in White-acre, for the Word Item, is not ſo much as in the ſame Manner. Trin. 40 El. B. R. per Curiam.

2. (a) If a Man deviſeth Black-acre to one in Tail, and alſo White-acre, the Deviſee ſhall have an Eſtate-tail in White-acre alſo, for it is all one Sentence, and ſo the Words, which make the Limitation of the Eſtate, go to both. Trin. 40 El. B. R. by Fenner cited to be adjudged in Banco.

(a) Salk. 235. L. P.

3. If a Man ſeiſed in Fee of a Houſe and Land, and makes his Will in this Manner, I deviſe the Moiety of my Houſe to my Wife for Life. *Item*, I deviſe the other Moiety of my Houſe to *J.* my ſecond Son. *Item*, I deviſe to *J.* my ſecond Son all the ſaid Houſe, and all the Land that appertains to it, after the Death of my Wife; in this Caſe by this Will, J. ſhall have an Eſtate for Life only after the Death of the Wife, and not an Eſtate in Fee. Paſch. 7 Jac. B. (b) Fawcet's Caſe adjudged.

(b) 1 Rol. Abr. 834. pl. 11. S. C.

4. If one having two Daughters *A.* and *B.* by ſeveral Venters, deviſes a Moiety of his Lands to his Wife for ſeven Years, and that his Daughter *A.* ſhall enter on the other Moiety at her Marriage, and *A.* marries within the ſeven Years and enters into a Moiety, and then *B.* dies without Iſſue, *A.* ſhall have but a Moiety, and not three Parts, and the Heir of the whole Blood to *B.* ſhall have the other Moiety. *Trin.* 17 *El.* between (c) *Cooper* and *Burrold*, 1 *And.* 47, 48. adjudged.

(c) Dyer 342. S. C. adjudged, becauſe by the Circumſtances of the Will it could not be intended the Father meant otherwiſe, but that each ſhould have an equal Advantement, and the Liberty of Entry was to uſe and occupy, &c.

5. If one deviſes his Lands in *A.* to his Wife for her Life, Remainder to his Son in Tail, *&c.* and then gives his Lands in *B.* to his Son, and alſo his Lands in *C.* and then gives to his ſaid Son his Lands in *D.* to hold all the laſt demiſed Premiſſes to his Son in Tail, *&c.* by this the Son hath an Eſtate-tail in the Lands in *B.* and *C.* for the Words *Laſt deviſed Premiſſes* ſhall be intended to limit the Eſtate in all. *Trin.* 28 *Eliz.* between (d) *Wiſeman* and *Paſchal*, 1 *And.* 160. *pl.* 205. adjudged.

(d) Ow. 140. S. C. adjudged, 1 Leon. 57. S. C. adjudged.

6. If one having a Remainder in Fee expectant upon an Eſtate-tail in the *Bell Tavern*, and poſſeſſed of ſeveral Leaſe-hold Eſtates, deviſes all his Eſtate, Right, Title and Intereſt, and all the Term and Terms of Years in what ever he held of *J. S.* and alſo the Houſe called the *Bell Tavern* to *J. N.* by this Deviſe he hath a Fee in the *Bell Tavern*, becauſe it is but one Sentence coupled by the Word *alſo*, and governed by one Verb, by which the Prepoſition *in* is carried to the *Bell Tavern*, and this muſt be taken to be the Intention of the Teſtator, who could not intend ſo vain and uſeleſs an Eſtate as for Life only after an Eſtate-tail. *Hill.* 1 *Ann.* between *Cole* and *Rawlinſon*, *Salk.* 234. adjudged by *Powel*, *Powys* and *Gold* contra *Holt* Ch. Juſt.

7. If one deviſes thus: Item, *I deviſe my Manor of* B. *to* A. *and his Heirs.* Item, *I deviſe all my Lands, Tenements and Hereditaments to* A. Item, *I deviſe all my Goods and Chattels, Money and Debts, and whatever elſe I have not diſpoſed of to* A. *he paying my Debts and Legacies*, *A.* hath a Fee in the Lands, *&c.* by Force of the Words, *Whatever elſe I have not diſpoſed of*; for theſe Words could have no Effect on the Perſonal Eſtate, becauſe that was given as fully as poſſible by the precedent Words, and therefore theſe Words muſt extend to Remainders, *&c.* and this is enforced by the Clauſe, *paying my Debts*, &c. *Hill.* 8 *Ann.* between *Hopewell* and *Ackland*, *Salk.* 239. by *Trevor* Ch. Juſt.

8. If one deviſes to *A.* the Son of his Brother *B.* and his Heirs, if he lives to twenty-one, and if he dies before twenty-one, then to the next Son of *B.* and *A.* dies before twenty-one, the next Son of *B.* ſhall have but for Life only. *Mich.* 5 *Will.* between *Beveſton* and *Huſſey*, *Skin.* 385, 562. but *vide*.

(N) Eſtate for (a) Life.

Eſtate for Life or Fee.

(a) Antiently, when a Leaſe for Life was made to one, it was expreſſed **durante vita ſua naturali**, otherwiſe it would have determined by his Entry in Religion. 2 Co. 48. b.

1. (b) **IF Leſſee for Life grants the Land to another and his Heirs of his Body, for the Life of the Leſſee, it is but an Eſtate for Life.** 18 E. 3. 44. b.

(b) If a Feoffment in Fee be made to A. during the Life of B. the Words **during the Life of** B. ſhall be void, being contrary to the Fee. Br. Eſtate 50. but yet **quere**, for the Books ſeem otherwiſe; **vid.** 1 Co. 140. 10 Co. 98. a. Co. Lit. 239. a. Hob. 323. 2 And. 138. 2 Rol. Abr. 66. p. 11. **vid.** and the Notes there.

2. **If I give Land to another until I come from** Saint James, **it is an Eſtate of Freehold.** 3 Aſſ. 9.

3. **If the King grants to another** Ballivam vel hujuſmodi donec bene & fideliter ſe geſſerit in Officio illo, **it is an Eſtate of Freehold.** 3 Aſſ. 9.

(c) Co. Lit. 42. a.

* Fol. 845.

(d) Fitz. Aſſiſe 186. S. C.

4. (c) **If a Man leaſeth Land to another, to have and to hold** donec ſolverit **to the Leſſor twelve Marks** annuatim; & ſi dictus Redditus aretro fuerit, liceat prædicto, * **the Leſſor** prædictam Terram ingredi quouſq; &c. **the Leſſor hath an Eſtate of Freehold in the Rent, and the Leſſee a Freehold in the Land.** (d) 3 Aſſ. 9. **adjudged.**

5. **If a Man grants to another Common of Turbary in certain Land, and to dig and carry at his Will, it is an Eſtate of Freehold, for the Words** (at Will) **refers to the Uſage, and not to the Common.** 5 Aſſ. 9. **adjudged.**

(e) Cart. 107. **vid.**

6. If Lands are limited in Uſe to one and his Heirs (e) until he or they have levied ſo much Money; this is a Fee-ſimple. *Trin.* 18 *Car.* 2. between *Thomaſin* and *Mackworth*, *Cart.* 75, 76, *&c.* reſolved.

(O) In what Caſes, where no Eſtate is limited, the Law will ſay that it ſhall be an Eſtate for Life.

(f) But at Will only. 1 Roll. Rep. 37.

1. **IF the King grants Land or Rent and limits no Eſtate, (f) it ſhall not be any Freehold.** Da. 1. 45. 17 E. 3. 45.

(g) Co. Lit. 42. a.

2. (g) **But if a common Perſon grants a Thing which lies in Grant, and limits no Eſtate, it ſhall be for the Life of the Grantee, becauſe it ſhall be taken moſt ſtrong againſt the Grantor.** Da. 1. 45. 17 E. 3. 45.

The ſame Law of Land if Livery be made.

3. **But if the King grants a Deanery or Biſhoprick generally, without limiting any Eſtate, they ſhall have a Fee, becauſe he could have limited no other Eſtate to them.** Da. 1. 46.

4. **A Parſon cannot be preſented, inſtituted and induced for Life or Years, but he ſhall have the uſual Eſtate notwithſtanding it.** Da. 1. 46.

5. **If the King grants a Deanery of a free Chapel to another, without limiting any Eſtate, he ſhall have a Fee, becauſe he can**

have no other Eſtate, and for the Miſchief of Abeyance. Da. 1. 46. contra 17 E. 3. 45.

6. If a Man (a) grants a Rent to another, without limiting any Eſtate, it ſhall be an Eſtate of Freehold. 7 Aſſ. 1. Co. 8. Sir Richard Pexhall 84. Co. Lit. 42.

(a) So if one covenants to pay 20 l. yearly, without mentioning for what Time, it ſhall be for Life. My ſecond Part 58. pl. 6.

7. If a Man deviſeth to another 100 Sheep, and 10 l. Rent, iſſuing out of all his Land, payable quarterly; and that the Deviſee may diſtrain for the Rent and the Arrearages, and the Diſtreſs ſo taken to hold until he be paid; and to hold Courts of all his Manors for Life upon Requeſt to Nicholas Moore, or his Deputy; it is a Rent for Life, for it is in Recompence of his Service in keeping of his Courts, which is for Life. Co. 8. Sir Richard Pexhall 85. b. per Curiam adjudged.

8. If *A.* leaſes at Will, rendring 6 *l.* yearly, and by Deed, reciting this Rent, grants *eundem redditum* to *B.* for his Life, and after the Leaſe at Will is determined, yet the Grantee ſhall have the Rent for his Life, for *eundem* ſhall be taken for *talem*, viz. *eundem in Specie*, viz. 6 *l.* yearly. *Trin.* 33 *Eliz.* between (b) *Kindler* and *Leverſage*, *Cro. El.* 241. adjudged.

(b) 1 Leon. 151. S. C. adjudged.

(P) Where no Eſtate is limited, in what Caſes the Law will create an Eſtate for Life.

1. If Husband ſeiſed in Right of his Wife for Life, bargains and ſells it by Deed inrolled to another, (c) it is an Eſtate of Freehold, for it is an Eſtate during the Coverture. Mich. 10 Jac. B. per Curiam.

(c) That ſuch Bargainee is a good Tenant to a Præcipe. Vid. 2 Rol. Abr. 394. pl. 4.

2. If a Man grants a Rent of 20 l. to another till he hath levied 100 l. it is an Eſtate for Years in the Grantee, and no Eſtate for Life, becauſe it is certain that he will have it for five Years. Co. Lit. 42. (d) 33 Aſſ. 2.

(d) Fitz. Verdict 42. S. C.

(e) 3. If A. leaſeth Land, or a Manor worth 20 l. per Annum to B. till he hath levied 100 l. it is an Eſtate for Life if Livery be made, and no Eſtate for Years if no Livery, becauſe it is not certain that the Profits will be worth 20 l. every Year. Co. Lit. 42. Co. 6. The Biſhop of Bath 35. b.

(e) 3 Bulſt. 100. S. P.

4. (f) If I have a Rent of 20 s. per Annum out of Land, and I grant it to B. till he hath levied 20 l. it is a Leaſe for twenty Years, for it is certain. Co. 6. The Biſhop of Bath 35. b.

(f) Pl. Com. 173. b. S. P.

5. If one grants an Eſtate to a Woman *dum ſola fuit*, or *durante viduitate*, or *quamdiu ſe bene geſſerit*, or to a Man and a Woman during the Coverture, or as long as the Grantee lives in ſuch an Houſe, or until the Grantee be promoted to a Benefice, or (g) for any like uncertain Time, if of Lands or Tenements, and Livery be made, or if of Rents, Advowſons, *&c.* that lie in Grant by the Delivery of the Deed, the Grantee hath an Eſtate for Life determinable. *Co. Lit.* 42. *a.*

(g) Vid. Pl. Com. 173. b. 3 Leon. 157. 3 Bulſt. 252.

6. If one makes a (h) Leaſe to another for Payment of his Debts, and until his Debts paid he hath a Freehold conditional. *Hill.* 36 *El.* (i) *Cordal's* Caſe, *Cro. Eliz.* 315, 316.

(h) Otherwiſe if one deviſes to his Executors for Payment of his Debts. 1 Rol. Abr. 830. p. 1. All. 45, 46, 47. Godb. 103. 1 Jon. 25. Co. Lit. 42. a.

(i) 8 Co. 96. a. S. C. cited, and vide

(Q) Where

Fol. 846.

(Q) Where no Eſtate is limited and the Law ſays that it ſhall be an Eſtate (a) for Life, for whoſe Life it ſhall be; and ſo where an Eſtate for Life is limited, and there is no Mention for whoſe Life.

(a) Where there ſhall be various Conſtructions with regard to different Circumſtances. 1 Rol. Rep. 370. 4 Mod. 172.

1. IF A. ſeiſed in Fee leaſeth for Life, without mentioning for whoſe Life, it ſhall be for the Life of the Leſſee, for it ſhall be taken moſt ſtrong againſt the Grantor. Co. Lit. 42.

(b) Co. Lit. 183. b. S. P. 2 Mod. 80, 81.

2. (b) But if A. Tenant in Tail leaſeth for Life, without mentioning for whoſe Life, it ſhall be for the Life of the Leſſor, becauſe otherwiſe it would be a Diſcontinuance and wrongful Eſtate, which the Law by Conſtruction will not make. Co. Lit. 42.

3. So if Tenant for Life leaſes generally, it ſhall by Conſtruction of Law be taken for a Leaſe for his own Life; for if it ſhould be for the Life of the Leſſee, it would be a Wrong to the Reverſioner. *Co. Lit.* 183. *a. b.*

(R) What Things or Eſtates may be leaſed.

(c) My ſecond Part 188. S. 2. S. C.
(d) That a Leaſe for Years may be made by Surrender. Vid. 1 Leon. 4. 4 Leon. 38.

Dy. (c) 8 El. 251. 90. Copyholder in Fee (d) ſurrenders to the Lord, ad Intentionem that his Lord ſhall grant it again to him for Life, Remainder to his Wife till his Son comes to full Age, and afterwards to his Son; the Copyholder dies, and afterwards the Lord executes it accordingly to the Wife; per Curiam, this Intereſt of the Wife is a Term.

Leaſes for (e) *Years.*

(e) By the old Law of England, a Man could not have made a Leaſe for above forty Years, for that by long Leaſes many were prejudiced, and often diſinherited. Co. Lit. 45, 46. 1 Vent. 58.

(S) Of what (f) Things they may be made in Reſpect of the Eſtate out of which (g) it is raiſed.

1. (h) A Copyholder of Inheritance, or for Life, according to the Cuſtom of the Manor, may by the Common Law make a Leaſe for a Year of the Copyhold, without the Aſſent of the Lord. Co. 4. (i) Melwich 26. Co. 9. Combe 75. b.

(f) A Leaſe for Years of incorporeal Things may be made by Deed by Way of Contract, reſerving Rent, for which Debt may lie, but Leſſor cannot diſtrain. Co. Lit. 47. a. but for this vid. under Title Rent, out of what a Rent may iſſue.
(g) In the Original it is ceo eſt.
(h) Mathews and Whetton, S. P. Cro. Car. 233. Jon. 249.
(i) My ſecond Part 208. pl. 3. S. C. which vid. with the Notes there.

2. But they cannot make a Leaſe of it for more than a Year by the Common Law.

3. A Copyholder of Inheritance by a Cuſtom may leaſe the Land for three Years, without the Aſſent of the Lord. Mich. 15 Jac. B. R. in an Ejectment inter Lee and Browne, on a Trial at Bar, ſuch Cuſtom was proved and admitted good by the Court and Counſel, and ſo it was admitted in another Trial at Bar that ſame Term, inter Dell and Cockdell.

4. (a) If a Copyholder leaſeth for Two or more Years, without any Cuſtom to warrant it, or Licence of the Lord, yet it is not meerly void, but the Leſſee may maintain an Ejectione firmæ againſt Strangers. Hill. 38 El. B. R. inter (b) Hatt and Arrowſmith agreed. It ſeems to be intended to be by Indenture.

(a) Ever and Aſton, L. P. Moor 271. pl. 425. 1 And. 192, 193. But for this vid. my ſecond Part 208. pl. 3. and the Notes there. Hard. 330.

(b) Haddon and Arrowſmith, S. C. Cro. El. 461. S. C. Ow. 72. Poph. 105. but S. P. does not appear.

5. So if the King's Copyholder leaſeth for Two or more Years without Warrant, yet it is not void, but the Leſſee may maintain an Ejectione firmæ againſt Strangers. Hill. 38 El. B. R. inter (c) Hatt and Arrowſmith.

(c) Haddon and Arrowſmith, S. C. Cro. El. 461. Ow. 72. Poph. 105. S. C. but S. P. does not appear.

6. (d) If a Man grants a Rent-charge to another and his Heirs, and covenants by the ſame Indenture to levy a Fine of the Land, which ſhall be to the Uſes following, ſcilicet, that if the ſaid Rent be arrear at any Feaſt, &c. and no Diſtreſs on the Land or Diſtreſs taken, and a Replevin ſued, then it ſhould be lawful for the Grantee and his Heirs to enter into the Land and retain it till Satisfaction of the Arrears of the ſaid Rent; and afterwards he levies a Fine accordingly, and afterwards the Rent is arrear, and no Diſtreſs on the Land or Replevin is ſued, and the Grantee enters into the Land, according to the Uſe limited by the Fine and Indenture, and retains it, (e) he hath a ſufficient Eſtate thereby on which to make a Leaſe * for Years of the Land, and the Leſſee to maintain an Ejectione firmæ on his Leaſe. Mich. 16 Jac. B. R. inter (f) Havergill and Hare on a Special Verdict adjudged per totam Curiam, and they would not argue it, but over-ruled it on Argument at the Bar.

(d) Jemmot and Cowly, L.P. 1 Saund. 112. adjudged, Raym. 131, 158. adjudged, 1 Sid. 223, 262, 344. adjudged, 1 Levin. 170, 171. adjudged, 1 Keb. 784, 915. 2 Keb. 280.

* Fol. 847.

(e) That he hath no Eſtate of Freehold, but an Intereſt to take the Profits in Nature of a Diſtreſs, quouſq; &c. Co. Lit. 203. and vide ante 1 Rol. Abr. 829, 830. what ſhall be an Intereſt and no Eſtate in Fee for Life, &c.

(f) Cro. Jac. 511. S. C. adjudged, 3 Bulſt. 250. S. C. adjudged.

7. (g) A Leaſe for Years of the Office of the Marſhalſey of the King's Bench cannot be made for the Inconvenience, (h) that then it ſhall go to the Executors, Adminiſtrators and Ordinary, &c. Co. 9. (i) Sir George Reynel 96. b. reſolved.

(g) Mead and Lenthal, S. P. 1 Jon. 463. adjudged, Cro. Car. 587. 2 Bulſt. 58. ſeems to be S. C. but S. P. does not appear. 2 Rol. Abr. 153. E. 1. S. C.

(h) But a Leaſe of this Office for Years, determinable upon the Life of the Leſſee is good, for the Danger of its going to Executors or Adminiſtrators is avoided. 6 Mod. 57.

(i) Hard. 49. S. C. cited, and by Nichols Juſt. denied to be Law. Hard. 357. S. C. cited, and ſaid by Hale, that before this Caſe the Law was taken to be otherwiſe. 2 Mod. 120. S. C. cited.

8. (k) The King cannot create one noble for Years, for then it might go to his Executors or Adminiſtrators. *Co. Lit.* 16. *b.*

(k) 8 Co. 97. b.

A Grant for Years may be made of the Office of (l) Regiſter of Policies of Aſſurance in *London*, erected by 43 *Eliz. cap.* 12. *Hill.* 15 *Car.* 2.

(l) Whether the Office of Barbier could, by the Mayor and Commonalty of London, be granted for Years, Style 397. debated, Hard. 46, 47, &c. debated.

between *Veal* and *Prior*, *Hard.* 351, 352. adjudged; and by *Hale* Ch. Juſt. it was not (a) univerſally true, that Offices cannot be granted for Years.

(a) That there are many Precedents of Offices granted for Years, vid. Hard. 354.

(b) 6 Mod. 57. L. P. adjudged.

9. (b) The Office of Steward of a Court-Leet and Court-Baron may be granted to Two for thirty Years, if the Grantees, or either of them, ſo long live, becauſe it determines by their Death, and the Office cannot fall to Adminiſtrators, which was the Reaſon of the Judgment in Sir G. *Reynold*'s Caſe. *Hill.* 31 & 32 *Car.* 2. between (c) Sir *Robert Howard* and *Wood*, 2 *Jon.* 126, 127.

(c) 1 Levinz 245. S. C. in which it is not mentioned, that the Grant was determinable by the Death of the Grantees, but ſaid, that the Court held, that the Grant quoad the Court-Leet, being of a judicial Office, was void, but quoad the Court-Baron, good.

(T) How, and by what Words, a Leaſe for Years may be made.

(d) For theſe Statutes, and the Notes thereupon, vid. poſt under this Title Eſtate.

1. RAſtal, (d) 13 El. cap. 20. 244. Leaſes 6. enacted That all Leaſes made by Eccleſiaſtical Perſons, by the Abſence of the Leſſor by eighty Days in anno, ſhould be void; yet 14 El. cap. 11. Leaſes 7. becauſe Bonds and Covenants of ſuffering others to enjoy Eccleſiaſtical Livings, are not in Law taken to be Leaſes, altho' they tantamount, it is enacted, that Bonds, Contracts, Covenants ſhould be within it.

(e) My ſecond Part 794. H. 1. S. C. 1 Rol. Abr. 831. H. 2.

2. If a Man deviſeth Land to one, and the Heirs Male of his Body begotten, for 5000 Years, it is a Leaſe for Years, and not an Eſtate-tail, becauſe it is expreſly ſaid, that it ſhall be for Years, and the Words ſhall limit the Eſtate ſo that it ſhall determine for Want of Iſſue. Co. 10. (e) Loves 87.

(U) By what Words.

1. IF A. covenants by Indenture with B. to levy a Fine of certain Lands within a Year after to the Uſe of B. and his Heirs; Proviſo, that if 100l. be paid to B. at the End of thirteen Years, that it ſhall be to the Uſe of A. and his Heirs. And by the ſame Indenture A. covenants and grants for himſelf, his Heirs, Executors and Aſſigns, with B. his Heirs, Executors and Aſſigns, that he, his Heirs, Executors and Aſſigns, ſhall quietly have, hold, and enjoy the Premiſſes from ſuch a Day, for thirteen Years, and ſo yearly from thenceforth for ever, until the ſaid 100l. be paid, according to the Intent, without the Let of A. or the lawful Let of any other, rendring 14d. Rent, and B. covenants that he will not do waſte: If no Fine be afterwards levied, this Covenant and Grant for the Enjoyment ſhall not be a Leaſe for thirteen Years, for it had Reference to the Fine, which ought to be levied, which by the Intent of the Indenture ought to raiſe the whole Eſtate intended. Trin. 5 Jac. B. R. inter (f) Evan and Thomas adjudged.

(f) Cro. Jac. 172. S. C. adjudged, 2 Mod. 80. S. C. cited.

(X) (a) What (b) Words will make a Leaſe for Years.

(a) Where a Licence to enjoy for a certain Time amounts to a Leaſe. Hob. 35. Moor 861. 1 Mod. 14. 2 Mod. 80. Salk. 588. and vid. Lan. 46. 1 Rol. Abr. 938. pl. 2.

1. IF a Man (c) covenants and agrees with another, that (d) he ſhall have certain Land for certain Years, ſcilicet for ſuch a Year to ſuch a Year, under ſuch a Rent, it is a good Leaſe for Years. My Rep. 14 Jac. Sir William Eſſex. Trin. 5 Jac. B. R. inter Tooker and Squier agreed. Hill. 12 Jac. B. inter (e) Tiſdale and Sir William Eſſex adjudged. Mich. 4 Car. B. R. inter (f) Geary and Read adjudged, which intratur Paſch. 4 Car. Rot. 432. Hobart's Reports 48. the ſame Caſe.

(b) If. covenants to pay B. 11 s. yearly, ſo long as B. ſhall continue Parſon, and B. covenants, in Conſideration thereof, & ſuper receptionem inde exonerare & acquietare him from Payment of Tithes for a Cloſe, ſo long as he ſhall continue Parſon; and whether this amounted to a Leaſe, 2 Rol. Rep. 121. debated. (c) That Covenant, Grant and Agree are proper Words to make a Leaſe. Whitlock and Horton, Cro. Jac. 91, 92. Noy 14. (d) Otherwiſe if he covenants that a Stranger ſhall have his Lands for certain Years, rendering, &c. Perry and Allen, Cro. El. 173. Ow. 97. 1 Leon. 136. and vid. Sweper and Sweper, 1 Leon. 177, 178. Cro. El. 156. (e) Hob. fol. 34, 35. S. C. adjudged, tho' there was a further Covenant for making as good and perfect a Leaſe as Counſel ſhould adviſe. 3 Bulſt. 204. S. C. adjudged, Moor 861. pl. 1183. S. C. adjudged, 1 Brownl. 23. S. C. but S. P. does not appear. (f) Cro. Car. 128. ſeems to be S. C.

2. If Articles of Agreement indented are made, ſealed and delivered between A. and B. which are ſuch, ſcilicet, Imprimis, It is agreed, that A. doth let ſuch Land to B. for five Years from Michaelmas after; provided, that the Leſſee ſhall pay therefore at Michaelmas and our Lady-Day 100 l. by even Portions, during the Term. And there was alſo another Covenant, that a Leaſe ſhould be made and ſealed by the ſaid A. before the Feaſt of All-Saints following, according to the Effect of theſe Articles, altho' here be a Covenant for the Sealing of a Leaſe afterwards, according to the Articles aforeſaid; yet inaſmuch as the Words of the firſt Covenant are, that A. doth let the * Land in the preſent Tenſe, and he hath Time thereby to make the Leaſe after the Leaſe is to commence by the firſt Article, it is a preſent Leaſe and Reſervation. Mich. 38, 39 El. B. R. inter (g) Harrington and Wiſe, adjudged in Debt for the Rent.

* Fol. 848.

(g) Cro. El. 486. S. C. adjudged, and that a Leaſe to be made muſt be intended of further Aſſurance only, being to be made after the Time began. Moor 459. pl. 638. S. C. adjudged, Noy 57. S. C. adjudged, for that by the Articles the Leaſe was to begin at Michaelmas, and by the Covenant he might make the Leaſe at any Time before All-Saints.

(h) 3. (i) If a Man (k) covenants with another (l) to permit and ſuffer him to have, hold, and occupy certain Land for a certain Time, it is not any Leaſe, for the Words, permit and ſuffer, ſhew the Intention to be only a Covenant. Trin. 5 Jac. B. R. inter (m) Tooker and Squier per Curiam.

(h) This is miſprinted in the Original, being there pl. 2. (i) 1 Mod. 81. S. P. admitted, becauſe the Intention of the Parties was only to make a Covenant. (k) An Award, that one ſhall have the Land, gives an Intereſt in a Leaſe; otherwiſe if awarded that he ſhall be permitted to enjoy, &c. My firſt Part 514. pl. 7, 8. (l) Where a Bargain and Sale was to be void on Payment of ſeveral Sums of Money in ſix Years, and the Bargainee covenanted not to take the Profits till Default of Payment; and it was held that this founded in Covenant, and amounted not even to a Leaſe at Will, the Covenant not being, that the Bargainor ſhall take the Profits. 1 Rol. Abr. 859. pl. 12. (m) 1 Rol. Abr. 859. pl. 10. S. C. 2 Rol. Rep. 121. S. C. cited.

(n) 4. If Articles of Agreement are drawn between A. and B. which are ſealed and delivered, wherein is contained in this Manner, ſcilicet, Imprimis, The ſaid A. is contented to demiſe the Parſonage, &c. to the ſaid B. from Michaelmas next for ſix Years, with theſe Words after in the Articles, viz. The Rent reſerved is an hundred Pounds

(n) This is miſprinted in Original, being there pl. 3.

Pounds *per Annum*, a Re-entry for Non-payment of the Rent, a Covenant for Reparations, a Covenant to do ſuch a Thing; and to theſe Articles the Parties put their Seals; this is not any Leaſe but a Covenant; for it appears on all the Covenants, that theſe were but Inſtructions to make a Leaſe, and not to have the Effect of a Leaſe. And the Word (contented) doth not intend the preſent but the Future. Mich. 40, 41 El. B. R. inter (a) Pleſaunts and Higham adjudged.

(a) Cro. Jac. 172. ſeems to be S. C. cited; tho' S. P. not mentioned.

5. Where one ſaid to another, you ſhall have (b) a Leaſe of my Land in *D.* for twenty-one Years, paying 10*s.* yearly, make a Leaſe in Writing, and I will ſeal it; this was held a good Leaſe by Parol, tho' no Writing was made, for the making in Writing was but for farther Aſſurance. *Trin.* 26 *Eliz.* (c) *Maldon's* Caſe, *Cro. El.* 33. adjudged, *ex relatione Lewis.*

(b) A Promiſe or Agreement, that one ſhall have a Leaſe of his Lands for eight Years, is no Leaſe, but only a Contract; but if one promiſes or agrees another ſhall have his Lands for eight Years, it is a good Leaſe. Ow. 49. and vid. 1 And. 136, 137. (c) Moor 8. pl. 3. S. C. and S. P. agreed by all the Judges.

6. If *A.* ſeiſed of a Cloſe, expoſes it to *B.* and *C.* to ſow at Halves, *viz.* that he ſhall find one Half of the Seed, and *B.* and *C.* the other Half, and manure it, and that *A.* ſhall have one Moiety of the Grain when reaped, and *B.* and *C.* the other Moiety; this is no Leaſe of the Cloſe, nor can *B.* and *C.* join with *A.* in an Action againſt a Stranger for entering the Cloſe; but it was ſaid that it would have been otherwiſe, if the Agreement had been for two or three Crops. *Trin.* 31 *Eliz.* between (d) *Hare* and others againſt *Cely*, *Cro. El.* 143. adjudged; but as to ſpoiling the Corn, it was ſaid they ought to have joined, being Tenants in Common thereof.

(d) Hare and Okely, 1 Leon. 315. S. C. it being found quod expoſuit ad culturam in Manner following, viz. &c. Goulſ. 77, 78. S. C.

7. Where it was expreſſed by Articles, that *A.* did demiſe, *&c.* In Witneſs whereof, *&c.* and afterwards a *Memorandum* was written in the ſame Paper, that theſe Articles were to be ordered by Counſel of both Parties, according to the due Form of the Law; and a Leaſe being after drawn by Counſel, and the Parties not agreeing thereto, it was held the Articles did not amount to a Leaſe. Between *Sturgion* and *Painter*, *Noy* 128. adjudged.

8. If by Articles made between *A.* and *B. A.* covenants, grants and agrees, that *B.* ſhall have his Land for ſix Years, & *in conſideratione inde* B. covenants, grants and agrees to pay a certain yearly Rent to *A.* his Heirs, Executors, *&c.* during the Term; as the Covenant for holding makes a Leaſe; ſo the Covenant and Grant to pay the Rent annually (e) amounts to a Reſervation; ſo that if *A.* dies, the Rent ſhall go with the Reverſion to his Heir, and not to his Executor. *Hill.* 6 *Car.* between (f) *Drake* and *Munday*, *Cro. Car.* 207. adjudged.

(e) But for this vide 2 Rol. Abr. 449. pl. 5, 6.

(f) 1 Jon. 231. S. C. adjudged.

9. If *J. S.* a Copyholder for Life, by Deed covenants, grants, and agrees with *J. N.* that he, his Executors or Adminiſtrators ſhall hold and enjoy the Lands for (g) ſeven Years, and ſo from ſeven Years to ſeven Years, during forty-nine Years, if *J. S.* ſo long lives: This is a Leaſe, and by (h) Conſequence a Forfeiture, tho' for that Reaſon it was objected, that it ſhould not be taken to be a Leaſe, and ſo to work a Wrong. *Paſch.* 28 *Car.* 2. between *Richards* and *Sely*, 2 *Mod.* 79, 80. The Court inclined accordingly, but gave no Judgment.

(g) I ſuppoſe he might by the Cuſtom of the Manor have leaſed for ſeven Years, tho' not ſo expreſſed in the Caſe.

(h) For this vid. my ſecond Part 195. pl. 8, 9.

10. If *A.* by Articles grants and agrees with *B.* his Heirs and Aſſigns, *quod licitum foret illis* at all Times to have and uſe a Way over a Cloſe of *A.* and in Conſideration thereof *B.* grants and agrees with *A.* to pay him and his Heirs 6 *d.* yearly; this is a good Grant of a Way, and not a Covenant for Enjoyment only. *Trin.* 2 *Will. & Mar.* between *Holms* and *Seller*, 3 *Lev.* 305. adjudged by *Pollexfen* and *Rookeby* being only in Court.

(Y) What ſhall be a good Leaſe for Years for Incertainty.

1. If a Man poſſeſſed of a Leaſe for Years grants all his Term after his Death, it is a good Grant, for it is as much as if he had ſaid, that he granted ſo much of his Term as ſhall be (*) to come at the Time of his Death, (b) which had been good as it ſeems. Contra Paſch. 43 El. B. R. inter Juel and Lingley.

(*) In the Original it is arere.

(b) That it would not have been good, vid. Pl. Com. 520. b. Cro. El. 217. 3 Leon. 86. Godb. 25. Caſ. in Parl. 205. Skin. 545. Caponhurſt and Caponhurſt, S. P. 1 Lev. 45. Ray. 27. 1 Keb. 130. and vid. Skin. 537. 2 And. 12.

2. So a Man poſſeſſed of a Term to commence after the Death of J. S. by Indenture recites it, and grants the Premiſſes, (c) Habendum all his Intereſt of the ſaid Term after his Death, it is a good Grant, for it is all one with the Grant before. Contra Paſch. 43 El. B. R. inter Juel and Lingley adjudged.

(c) For this vid. 2 Rol. Abr. 66. pl. 5, 6.

3. If a Man makes a Leaſe for ſo many Years as he ſhall live, it is void for the Incertainty. Co. Lit. 45. b.

(d) 4. If Leſſee for Years grants to another ſo many of the Years as ſhall be (*) to come at the Time of his Death, it is void for the Incertainty how many will be to come at his Death. Com. 520. b. 7 E. 6. Brook Grants 154. Co. 1. (e) Rector Chedington 155. per Curiam.

(d) Br. Leaſes 66. S. P. Hob. 171. S. P. being but one intire Sentence, vid. Notes ſupra, pl. 2. —— But if Leſſee for Years grants all his Eſtate, habendum after his Death, the Grant is good, and ſhall not be fruſtrated by the Habendum, Hob. 171. but for this vid. 2 Rol. Abr. 66. pl. 5, 6. Skin. 544, 545. Dyer 272. a. Goſhake and Chiggil, Cro. Car. 154. 1 Jon. 205. (*) In the Original it is arere. (e) Moor 478. pl. 684. S. C.

5. (f) If Leſſee for Years, by his Will, deviſeth ſo many of the Years as ſhall be left at the Time of his Death, it is good, becauſe the Will takes Effect by his Death, and no Intereſt paſſeth before. 7 E. 6. Brook Grants 154.

(f) Moor 635. pl. 871. Caſ. in Parl. 203.

6. (g) If Leſſee for ninety Years demiſeth the Land to another for ſeventy Years after his Death, it is good, becauſe it is a certain Term. Mich. 34, 35 El. adjudged. Co. 1. (h) Rector Chedington 155.

(g) Salk. 413. S. P.

(h) Moor 478. pl. 684. S. C.

7. If A. leaſeth to B. for Life, with ſuch Proviſo, Proviſum eſt, that if the Leſſee dies before the Term of forty Years, that his Executors and Aſſigns ſhall have the Land for ſo many of the Years as ſhall amount to forty Years, to be accounted from the Date of the Indenture; this is not any Leaſe, but only a Covenant for the Incertainty. (i) Dy. 3, 4 Mar. 150. Co. 1. (k) Rector Chedington 155.

(i) N. Bendl. 72. pl. 115.

S. C. adjudged, 1 And. 19. S. C. adjudged, 3 Leon. 196. S. C. cited, but vid. my ſecond Part 230. pl. 6. with the Notes there. (k) Lloyd and Wilkinſon, Moor 478. pl. 684. S. C. and fol. 480. S. C. cited.

8. (a) If a Man leaſes Land to another, habendum a morte ſua for forty Years, it is a good Leaſe. 7 E. 6. Brook Grants 154.

(a) Gzute and Locroft, S. P. Cro. El. 287. adjudged, Poph. 4. adjudged, Poph. 97. ſeems to be S. C cited, Moor 395. S. C. cited.

9. The Years ought to be certain when the Leaſe is to take Effect in Intereſt or Poſſeſſion, but before it may depend upon an Incertainty, viz. on a poſſible Contingency. Co. Lit. 45. b. Co. 6. The Biſhop of Bath 35.

* Fol. 849.

* 10. If A. grants to B. that when B. hath paid 20 l. to A. he ſhall have a Leaſe for twenty-one Years in Black-acre, and afterwards B. pays the 20 l. he ſhall have a good Leaſe for twenty-one Years from thence next following. Co. Lit. 45. b. Co. 6. The Biſhop of Bath 35.

(b) 1 And. 259. S. P. Hob. 174. S. P. Godb. 25. per Coke arguendo, but ſaid, if A. dies before J. S. names, all is void, for that the Intereſt ought to paſs out of the Grantor during his Life. 3 Leon. 86. Moor 479. 6 Co. 35. b.

11. (b) If A. leaſeth to B. for ſo many Years as J. S. ſhall name, and afterwards J. S. names the Years, it is a good Leaſe for ſo many Years as J. S. names. Co. Lit. 45. b. Co. 6. 35. b.

12. Altho' there doth not appear any Certainty in the Leaſe of the Years; yet if by Reference to a Certainty it may be made certain, it is a good Leaſe. Co. Lit. 45. b. Co. 6. 35. b.

(c) 6 Co. 35. b. S. P. 1 Bulſt. 219.

13. (c) If A. leaſeth Land to B. for ſo many Years as B. hath in the Manor of D. and B. hath a Term of ten Years, it is a good Leaſe for ten Years. Co. Lit. 45. b.

14. If one leaſes to another for ſo many Years as his Executors ſhall name, this is void, for it ought to be reduced to a Certainty in the Life of the Parties. 1 *Co.* 155. *b.* in the Rector of *Chedington*'s Caſe.

15. One poſſeſſed of a Leaſe for Years by Parol, diſpoſes of it in the Words following, *viz. I give my Leaſe of and in*, &c. *after my Death, to my Son S. and his Wife*; and there being a Doubt before my Lord Chancellor, concerning the Validity of this Grant, he referred it to the Chief Juſtices, who thought the Grant void; and that it could not take Effect according to the Words, being no more than a Grant of ſo much of his Term as ſhall be to come after the Death of the Grantor, which would have been intirely void; for in ſuch Caſe none would know what would paſs, becauſe of the Uncertainty; and to ſay, that the Words, *after the Death*, ſhall be void, and ſo the Grant good, is againſt Reaſon, being contrary to the Intent of the Grantor. 1 *And.* 122. *pl.* 170. and of that Opinion were *Mead* and *Periam* Juſtices.

16. If one lets Lands to *J. S.* for ninety-nine Years, if he ſo long lives, and if he dies within the Term, that then his Wife ſhall have it (d) *durante toto reſiduo termini præd'*, and *J. S.* dies within the Term, yet his Wife ſhall not have it, for the Term was wholly determined, and the Limitation to her void for Want of Certainty. *Trin.* 32 *Eliz.* between (e) *Green* and *Edwards*, *Cro. El.* 216. reſolved by all the Judges; but *Anderſon* ſaid, if the Wife had been Party to the Deed, it might have been good, & *durante termino*, not taken for the Intereſt, but Time, which *Walſmly* and *Windham* expreſly denied.

(d) Where the Demiſe was pro tot annis quot remanerent poſt mortem, &c. pro & durante reſiduo termini, &c. and held void. Rector of Chedington's Caſe, 1 Co. 153. b. adjudged per totam Curiam. Moor 479. —— But where pro tot annis de præd' 99 annis, it is otherwiſe. 2 Roll. Abr. 415. b. which vid. with the Notes there, Caſes in Parl. 203. (e) Moor 297. pl. 441. 1 And. 258. pl. 266. S. C. adjudged, and one Reaſon given, that the Wife was no Party to the Deed, which vid. and the Argument there, that it would have been good, if ſhe had, 1 Leon. 218. S. C. adjudged, and vid. Dyer 253. pl. 102. Moor 247. pl. 388.

17. If Leſſee for 1000 Years, by Deed reciting the Leaſe, grants the (f) Land to *J. S.* his Executors, Adminiſtrators and Aſſigns, *habendum*

(f) 1 Salk. 346. Holt agreed it would have been ſo, if the Grant had been of the Term, &c.

to *J. S.* his Executors, *&c.* after the Death of the Grantor and his Wife, for the Reſidue of the Term, the whole Term paſſes preſently by the Premiſſes, and therefore the *Habendum* is repugnant and void. *Mich.* 3 *Will. & Mar.* between (a) *Germain* and his Wife and *Orcherd*, *Salk.* 346. adjudged upon a Writ of Error in the Exchequer Chamber, and the Judgment in *B. R.* to the contrary reverſed, and after *Trin.* 6 *Will. & Mar.* that Judgment of Reverſal affirmed in the Houſe of Lords.

(a) Skin. 528. &c. S. C. with a long Argument in the Exchequer Chamber, and the Judgment in B. R. reverſed by Six Judges againſt Two; and it was ſaid the Caſe was ſuddenly reſolved in B. R. upon the firſt Argument, tho' Eyre Juſtice ſeemed then to diſſent, and Holt Ch. Juſt. and Dolben only ſpake to the Point, and ſaid there was nothing in it; but it appeared after to be a Caſe of Weight, and the Grant was reſolved to be good on the Premiſſes, and that the Habendum was to be rejected as repugnant. Caſes in Parl. 199, 200. S.C. in which ſaid the Majority of the Judges in Weſtminſter-Hall, viz. the four Judges in B. R. and two others, were of Opinion the Grant was void; yet the Judgment in B. R. being reverſed, as above, that Reverſal was affirmed in the Houſe of Lords.

(Z) (b) When the Leaſe ſhall be ſaid to commence.

(b) With regard to the Date, Delivery, &c. vid. 2 Rol. Abr. 520. pl. 12, &c.

1. (c) If a Man leaſeth for twenty-one Years, without any Mention at what Time it ſhall commence, it ſhall commence immediately, ſcilicet, from the Delivery, for then the Words take Effect. Co. Lit. 46. b.

(c) 1 Leon. 198. S. P. arguendo, Bridg. 21. S. P. arguendo, 1 Bulſt. 27. S. P. arguendo.

2. If a Man leaſeth for twenty-one Years to A. and afterwards makes another Leaſe to B. for twenty-one Years, to commence a Fine & expiratione prædicti (d) Termini 21 Annorum, and afterwards A. ſurrenders his Eſtate for Years, the Leaſe made to B. ſhall commence preſently. Co. Lit. 45. b. Co. (e) 1. Rector Chedington 155.

(d) For this Diverſity inter terminum annorum & ſpatium ſive tempus annorum, vid. 1 Co. 153. b. 154. a. Br. Expoſition de Parols 44. Lord Paget's Caſe, 1 Leon. 194, 195, &c. But in the Report of that Caſe in Moor 193. pl. 343. 2 And. 259. pl. 267. this Difference is not taken; but vide Green and Edwards, Cro. Eliz. 216. Moor 297. pl. 441. 1 And. 258. pl. 266. 1 Leon. 218. and vid. Dyer 253. pl. 102. Moor 247. pl. 388. Moor 479. Caſ. in Parl. 203. 2 Rol. Abr. 415. b. which vid. with the Notes there. (e) Lloyd and Wilkinſon, Moor 478. pl. 684. S. C.

(f) 4. But if the Leaſe made to B. had been limited to commence poſt Finem & Expirationem prædictorum 21 Annorum, and afterwards A. ſurrendered his Term, yet the Eſtate made to B. ſhould not commence till the firſt Years ſhould end by Effluxion of Time, for there is a Diverſity between the Term of twenty-one Years, and twenty-one Years. Co. Lit. 45. b. Co. 1. (g) Rector Chedington 155.

(f) This is printed as in the Original, and the Placita continued without the Number 3.

(g) Lloyd and Wilkinſon, Moor 478. pl. 684. S. C.

5. If an Indenture of Leaſe bears a Date (h) which is impoſſible, as 30 Februarii, or 40 Martii, and the Term for Years is limited to commence from the Date, it ſhall commence from the Delivery as if no Date had been. Co. Lit. 46. b.

(h) The Law rejects it, becauſe it could be no Part of the Agreement of the Parties. 1 Mod. 180. per Vaughan and Atkins.

6. (i) If a Man by Indenture of Leaſe recites a Leaſe which is not, or that is void, or (k) miſrecites a Leaſe in a Point material, which

(i) Baſſet and Lewis, L. P. 1 Lev. 77. adjudged, 1 Keb. 360. adjudged, and vide Lit. Rep. 371. 2 Leon. 11. Cart. 148. Vaugh. 73, 80, 83, 84.

(k) 1 And. 284. Dyer 116. pl. 70. N. Bendl. 38. pl. 71. —— But 'tis otherwiſe in the Caſe of the King; for if he leaſes to

to begin after a former Leaſe, and there is none ſuch, it is void. 2 Rol. Rep. 357. 1 Sid. 461. —— And therefore it is uſual in ſuch Caſe, when doubtful whether the former Leaſe is good, to make the **Habendum** from the End of the former Leaſe, if ſuch there be, and if not, from ſuch a Feaſt, and ſuch Commencement in Judgment of Law is certain enough. 6 Co. 36. a. 8 Co. 166. b.

which is in eſſe, **to have from the End of the firſt Leaſe, it ſhall commence from the Delivery.** Co. Lit. 46. b.

7. **In** Ejectione firmæ, **if the Plaintiff declares on Leaſe made by** J. S. 20 Auguſt, **for twenty Years,** a Feſto Annunciationis beatæ Mariæ Virginis ultimo præterito ante Datum hujus Indenturæ, &c. **and there is no Mention of any Indenture nor Date of it in the Declaration, this Leaſe ſhall commence from the ſaid Feaſt of the Annunciation before the** 20 Auguſt, **becauſe if the Words** (ante Datum hujus Indenturæ) **had not been in the Declaration, the Leaſe ſhould ſo commence, and the Addition of the ſaid Words ſhall not hurt it, but they ſhall be void.** Paſch. 40 El. B. R. Darcet's **Caſe adjudged, it being moved in Arreſt of Judgment.**

8. **If a Man leaſes for Years to** B. **and afterwards by Indenture recites the Leaſe made to** B. **but miſrecites the Date of the Leaſe, and then demiſes the Land to** C. Habendum **from the Expiration or other Determination of the firſt Leaſe, for certain Years: This Leaſe made to** C. **ſhall commence preſently, foraſmuch as there is not any ſuch Leaſe on which it is limited to commence.** Hill. 10 Car. B. R. inter (a) Miller **and** Manwaring, per Curiam, **adjudged in a Writ of Error on a Judgment at** Cheſter **which concerned Sir** Randall Crewe. Intratur Trin. 10 Car. Rot. 321.

(a) Cro. Car. 399,400 S.C. adjudged, 1 Jon. 355.

S. C. adjudged, and that with regard to the Number of Years it begins preſently, tho' not in Intereſt till the former Leaſe ended. Vaugh. 80. S. C. cited, Cart. 149, 150. S. C. cited.

9. **If a Leaſe be made for thirty-one Years, which commences** Anno Domini 1531, **and afterwards** in Anno Domini 1535, **the Leſſor reciting the ſaid Leaſe, makes a new Leaſe by Deed, by theſe Words,** Noveritis me dictis 31 annis finitis & completis dediſſe & conceſſiſſe omnia præmiſſa **to** J. S. Habendum & * tenendum a die Confectionis Præſentium (Termino prædicto finito) uſque ad Finem Termini (b) 31 Annorum tunc immediate ſequentium plenarie complendorum: **This Leaſe ſhall commence in Computation from the Expiration of the firſt Leaſe, for thirty-one Years, and ſhall continue for thirty-one Years after the Expiration of the firſt Leaſe; for if it ſhould commence from the Day of the Making of the Deed, then there would be but four Years to come after the Expiration of the firſt Leaſe, which was contrary to the Intent of the Parties; and therefore it ſhall be interpreted that he ſhall have it for thirty-one Years after the Day of the Date, and the Expiration of the firſt thirty-one Years,** ſcilicet **after both.** Dubitatur (c) Dy. 9 El. 261. 28. Curia de Banco contra Curiam de Banco Regis.

* Fol. 856.

(b) This is miſprinted in Roll, being there 30.

(c) 1 Leon. 199. S. C. cited, Bridg. 98. S. C. cited, All. 76. S. C. cited.

10. **In an** Ejectione firmæ, **if the Plaintiff declares of a Leaſe made by** A. **to him of certain Land,** Habendum **from** Michaelmas ultimo præterito ante Datum Indenturæ prædictæ **for ſix Years, and there is not any Mention of any Indenture before, it ſhall be taken to be a Leaſe from** Michaelmas **before, foraſmuch as it doth not appear that there was any Indenture.** Paſch. 15 Car. B. R. inter Elme **and** Leaves, per Curiam, **adjudged, it being moved in Arreſt of Judgment after a Trial at Bar on ſuch Declaration.** Intratur Trin. 14 Car. Rot. 1253.

11. **If an Indenture of Demiſe bears Date** 4 Maii, 10 Jac. **and it is delivered** 5 Maii, 10 Jac. **and the Words of the** Habendum **are,**

Habendum de Feſto Annunciationis beatæ Mariæ Virginis tunc ultimo præterito pro Termino Viginti unius annorum proximo ſequentium datum dictæ Indenturæ, this Leaſe commences in Computation from Lady-Day before the Date, and in Intereſt the fifth Day, which is the Day next after the Date; and ſo all the Words of the Indenture will take Effect the fifth Day, being the Day of the Delivery of the Deed. Hobart's Reports, Caſe 32. inter (a) Moore and Muſgrave, adjudged in Scaccario, and affirmed in a Writ of Error. This was the Caſe by the Record, altho' it is otherwiſe falſly printed in the Book.

(a) Hob. fol. 18. S. C. All. 77. S. C. cited, 2 Rol. Abr. 704. pl. 21. S. C.

12. If an Indenture of Demiſe bears Teſte 25 Martii, 15 Car. and it is deliver'd the Day of the Date, and the Habendum is, Habendum & tenendum from and after the Day of the Date of theſe preſents, for and during the Term and Time of ſeven Years, (b) from henceforth next and immediately following fully to be compleat and ended; this Leaſe commences in (c) Computation from the Delivery of the Deed, which was the Day of the Date, and in Intereſt the next Day after the Date, and ſo all the Words will take Effect; for it appears that he ſhould not have the Poſſeſſion till the next Day after the Date, forasmuch as the Words are Habendum & tenendum from and after the Day of the Date; but that the ſeven Years ſhould commence by Computation from the Delivery, ſcilicet from henceforth, which refers to the Limitation of ſeven Years. Trin. 24 Car. B. R. inter (d) Corniſh and Cawſey, adjudged in Arreſt of Judgment. Intratur Trin. 23 Car. Rot. 1434. on a Special Verdict, where he declared on a Demiſe by Indenture dated 25 Martii, and on a Demiſe until Habendum a die datus for ſeven Years; and adjudged againſt the Plaintiff, being for Rent reſerved.

(b) By the Report in Styl. 118. the Habendum was a die datus for ſeven Years, from Lady-day laſt paſt, from henceforth fully, &c.

(c) A Leaſe being made to one for twenty-one Years, and after a ſecond Leaſe to another, to hold from the 20 Decemb. 1 Eliz. (being the Date of the ſecond Leaſe) for fifty Years from thence next enſuing the End of the former Leaſe; it was inſiſted, that theſe ambiguous Words ſhould have ſuch Conſtruction as ſhould be reaſonable and agreeable with them all, and that the fifty Years ſhould begin 20 Dec. 1 Eliz. to take Effect in Poſſeſſion after the End of the former Leaſe. Bridg. 100. adjudged accordingly, and vid. Noy 2.

(d) All. 75. S. C. adjudged, and ſaid by Rol. to hold from the Day of the Date, from henceforth for ſeven Years, the Plaintiff had declared right. Styl. 118. S. C. Adjornatur.

13. (e) If one lets *S.* Meadow to *A.* for ten Years, and *C.* Meadow to *B.* for twenty Years, and after reciting theſe Leaſes, lets both Meadows for forty Years, to begin after the End or Determination of the ſeveral Leaſes made to *A.* and *B.* theſe Words ſhall be taken reſpectively *reddendo ſingula ſingulis*, ſo that when the Leaſe for ten Years of *S.* Meadow is determined, the Leaſe for forty Years therein ſhall begin, and not wait till the Leaſe for twenty Years in the other Meadow is determined. *Mich.* 31 & 32 *Eliz.* Juſtice (f) *Windham's* Caſe, 5 *Co.* 7. *a.* adjudged.

(e) Veal and Roberts, L. P. Cro. El. 199. adjudged, 2 Leon. 105. adjudged, 1 Saund. 183. cited.

(f) Moor 191. pl. 340. S. C. adjudged, and that the Term of forty Years in each Meadow ſhall begin as the former Leaſes expire; but if they are both ſurrendered together, the new Leaſe ſhall commence in both preſently.

14. If a Woman, Leſſee for Years, marries and dies, and the Reverſioner leaſes for Years, to begin after the Term demiſed to the Husband, whereas it was made to the Wife, and by Act of Law transferred to the Husband; yet this by a reaſonable Conſtruction ſhall be taken as demiſed to the Husband, ſo as to make this ſecond Leaſe have a good Commencement. 6 *Co.* 36. *a. b.* In the Biſhop of *Bath's* Caſe, cited from (g) *Pl. Com.* 192. *a.*

(g) Dyer 177. pl. 35. S. C. Cart. 149. S. C. cited.

15. If *A.* leaſes to *B.* and *C.* for ſixty Years, provided that if both *B.* and *C.* die within the ſixty Years, that *A.* and his Heirs may enter, and *B.* dies, and *A.* leaſes to *D.* for ſixty Years *cum poſt ſive per mortem ſurſumredditionem vel forisfacturam* of *C. accideret vacare* for ſixty Years, this will be taken moſt ſtrongly againſt the Leſſor, and moſt beneficially for

the Leſſee; and tho' the firſt Leaſe could not determine by the Death of *C.* until a Re-entry, unleſs by Effluction of Time; yet whenever it determines either by Entry or Effluction of Time, the ſecond Leaſe ſhall begin, and the Words are *cum poſt mortem, &c.* and not only *per mortem, &c.* and by Effluction of Time it muſt determine *poſt mortem, &c. Trin.* 3 *Jac.* 6 *Co.* 34. *b.* (a) The Biſhop of *Bath*'s Caſe.

(a) Fiſh and Bellamy, S.C. Cro. Jac. 71. adjudged by three Judges againſt Two, that it ſhall begin when the firſt Leaſe determines by Effluction of Time poſt mortem, &c. of C. Lit. Rep. 364, 370. S. C. cited, 4 Mod. 278. S.C. cited.

16. If one makes a Leaſe to begin after the Surrender, Forfeiture, Determination, or end of a former Leaſe, it muſt begin when the firſt of theſe happen, for the Words, *which of them ſhall firſt happen*, are implied, and the Leſſee hath no Election; for if the firſt Leaſe be ſurrendered, the ſecond Leaſe ſhall begin preſently, and the Leſſee cannot (b) chuſe to have it begin after the Expiration of the Time in the firſt Leaſe. *Trin.* 3 *Jac.* in the Biſhop of *Bath*'s Caſe, 6 *Co.* 36. *b.* reſolved *per Curiam.*

(b) Leaſe for forty Years, if A. B. and C. or any of them ſo long live, and after, from the Annunciation in 1568. or from the Surrender, Forfeiture, Expiration, or other Determination of the former Leaſe, and A. lived till 1568, and when the ſecond Leaſe ſhould begin, or whether the Leſſee ſhould have his Election. Lit. Rep. 363, 370. debated upon a Special Verdict, in which it was found, that the Leſſee choſe to have it begin after the End of the former Leaſe. Et adjornatur.

17. If a Copyhold being granted to *A. B.* and *C.* for their Lives ſucceſſively, *ſicut nominantur*, the Lord leaſes for forty Years, after the Death, Surrender, or other Determination of the Eſtate of *A. B.* and *C.* and *A.* and *B.* die, and *C.* marries and dies, and his Wife by Cuſtom holds in as her Free Bench, this Leaſe in Computation of Time ſhall not begin till after the Death of the Wife, (c) for the Free Bench is a Continuance of the Eſtate of the Husband, and the Words *Death, &c.* ought to be taken of ſuch Death, *&c.* as determines the Eſtate by Reaſon of the Words following, *or other Determination of the Eſtate. Hill.* 12 & 13 *Car.* 2. between (d) *Chantrel* and *Randal*, 1 *Lev.* 20. ſeems to be the better Opinion by the Book, tho' objected it ſhould begin upon the firſt of the Contingencies that happened. *Et adjornatur.*

(c) For this vid. my ſecond Part 184. M. 1. with the Notes there.

(d) Candle and Clark, 2 Sid. 165. S. C. adjornatur.

18. If after Miſ-recital of a Leaſe to *A. &c.* the (e) *Habendum* had been for twenty-one Years after the Intereſt of *A.* determined, this had been good for twenty-one Years after the End of *A.*'s Leaſe, notwithſtanding the Miſ-recital. *Hill.* 19 & 20 *Car.* 2. in (f) *Foot* and *Berkly*, 1 *Lev.* 234. by *Kelynge* and *Twiſden.*

(e) So if after Miſ-recital of a Leaſe the Leſſor grants the Reverſion and Rent, this is a good Grant per Hob. 128, 129. but for this vid. 2 Rol. Abr. 44. pl. 19. and the Notes there.

(f) 1 Vent. 84. S. C. and S. P. per Twiſden.

19. Queen *Elizabeth*, 22 *Apr.* (g) 32 *Eliz.* leaſed to *A.* for thirty Years, from the End of a Leaſe for ninety-ſix Years then in Being, and the Reverſion was after ſettled by *Car.* 1. upon his Queen; and the 12 *May*, 14 *Car.* 1. reciting the Grant by Queen *Eliz.* as dated the 22 *April*, 42 *Eliz.* (h) ſhe demiſed to *B.* for twenty-one Years, from the End or Determination of the Eſtate granted to *A. per Literas Patentes præd'*; this Leaſe to *B.* by Reaſon of the Miſ-recital, began preſently upon the Sealing and Delivery thereof, the *Habendum* being from the End of the Term granted to *A. per Literas Patentes præd'*, (when there were none ſuch) (i) tho' by this Conſtruction the Leaſe to *B.* was intirely void and fruitleſs,

(g) By the Report of this Caſe in other Books the Leaſe is ſaid to be made the 42 Eliz. and recited to be made 32 Eliz. but I think that cannot alter the Caſe.

(h) By the Report of this Caſe in all or moſt of the other Books, it appears the Settlement was on Truſtees for the Queen, and that they made the Leaſe. (i) Leſſee for 100 Years leaſes to A. for forty, if he lives ſo long, and then leaſes to B. to hold after the Term of A. for twenty-three Years, to be accounted from the Date; yet it ſhall not begin from the Date, but from the End of A.'s Term, for being good by the firſt Words, it ſhall not be made void by the ſubſequent. Godb. 166.

becauſe it expired before the Leaſe to *A.* and *B.* was obliged to pay the yearly Rent of 60 *l.* reſerved thereon during the twenty-one Years, tho' he could not have the Poſſeſſion. *Hill.* 19 & 20 *Car.* 2. between (a) *Foot* and *Berkly*, 1 *Lev.* 234. adjudged in *B.* and that Judgment after affirmed upon a Writ of Error in *B. R.*

(a) 1 Vent. 83. S. C. adjudged in B. (Tyrrel only to the contrary) and affirmed upon a Writ of Error in B. R. 1 Sid. 460. S. C. adjudged upon a Writ of Error accordingly. Cart. 147, &c. S. C. as adjudged in B. (Tyrrel diſſenting) with the ſeveral Arguments of the Judges. 2 Keb. 654, &c.

20. A Prior and Convent, 1 *H.* 8. leaſed to *A.* for three Lives, and after leaſed to *B.* for fifty Years, and then leaſed to *C.* for ſixty Years, and the Reverſion coming to Queen *Elizabeth*, ſhe, the 7 *Eliz.* reciting the Leaſe for three Lives only, granted to *D.* after the Expiration of that Leaſe, or when ever the Land by any Means ſhould come into the Hands of the Crown, and when the Leaſe to *D.* ſhould begin, *viz.* from the Death of the laſt *Ceſtuy que vie*, or after the Expiration of the Leaſes for fifty and ſixty-one Years, or whether *D.* had his Election. *Mich.* 20 *Car.* 2. between *Aprice* and *Hayes*, *Hard.* 498, *&c.* debated; and by *Hale*, Chief Baron, if all the Leaſes had been recited, the Leſſee might have had his Election. *Et adjornatur.*

21. If in Ejectment, the Plaintiff declares, that *J. S. per ſcriptum ſuum obligatorium* demiſed to the Plaintiff *habendum a die datus Indenturæ præd'*, this Writing ſhall be intended an Indenture, tho' improperly called *Scriptum obligatorium*, for every Deed obligeth, or if not, the Leaſe ſhall commence preſently, as if from the 40th of *September*. *Trin.* 23 *Car.* 2. between (b) *Taylor* and *Fitzgerald*, 1 *Vent.* 137. adjudged upon a Writ of Error upon a Judgment in *Ireland*, after a Verdict there given for the Plaintiff. *Nota*; The Book does not mention that the Leaſe was for Years, but muſt be ſo intended.

(b) 2 Keb. 796. S. C.

22. If a Leaſe is made the 10 *Octob. &c.* to hold from the 20 *Novemb.* for five Years, it is uncertain what *November* is meant; and tho' the Law would reject an impoſſible Date, becauſe it could be no Part of the Agreement, yet this is ſo (c) uncertain a Limitation that it cannot be known when the Leaſe ſhall begin. *Paſch.* 26 *Car.* 2. *Anonymus.* 1 *Mod.* 180. adjudged by *Vaughan* and *Atkins* contra *Windham.*

(c) That a Leaſe to begin at the Feaſt of our Lady Mary, without mentioning which, may be aſcertained by the Entry of the Leſſee. Vide 1 Leon. 227. —— Leaſe to begin from the Nativity of our Lord laſt paſt (omitting Feaſt) begins preſently, 1 Vent. 84. cited to be adjudged; but Twiſden ſaid ſuch Leaſe was void; but the Reporter hath made a Quære, whether it does not begin preſently.

23. If one reciting a former Leaſe demiſes to *A.* for twenty-one Years, from the End of the former Leaſe, reſerving a Rent, with Power of Reentry for Non-payment, and then covenants and grants that *A.* ſhall have the Land for other twenty-one Years, and ſo from twenty-one to twenty-one Years, until ninety-nine Years thence next enſuing, and there was no ſuch former Leaſe as recited, *A.* ſhall hold for ninety-nine Years beyond the firſt twenty-one Years, and the firſt twenty-one Years ſhall not be accounted Part of the ninety-nine Years; for if the ninety-nine Years had been intended from the Making, it would have been *hence*, but *thence* denotes another Time and not the preſent; and it could not refer to the Leaſe recited when there was none. *Hill.* 30 & 31 *Car.* 2. between (d) the College of *Mancheſter* and *Trafford*, 2 *Lev.* 241. adjudged.

(d) 2 Show. 31. S. C. very ill and imperfectly ſtated and reported.

FR
MVSEVM
BRITANNICVM

(A) For how many Years the Leaſe ſhall be ſaid to be made.

1. IF a Parſon leaſes Tithes to another for three Years, and at the End of thoſe three Years for another three Years, & ſic de tribus annis in tres annos, during the Life of the Leſſor, this ſhall be a Leaſe for twelve Years. Hill. 13 Jac. B. R. inter (a) Newberrie and Rathebone reſolved.

(a) 1 Rol. Rep. 287. S. C. adjudged, 3 Bulſt. 158. S. C. adjudged, and by Dodderidge, Juſtice, if it had been & ſic de tribus annis prædict' in tres annos, it had been but for nine Years.

(b) 6 Mod. 215. S. P. per Holt Ch. Juſt. and vid. 1 Bulſt. 190.

2. (b) If a Man leaſes from three Years to three Years till nine Years, it is a good Leaſe for nine Years. Paſch. 1 Jac. B. Wilcocks's Caſe adjudged.

* Fol. 851.

(c) Lutw. 214. S. P. agreed by the Court. 2 Keb. 16. L. P.

* (c) 3. If a Man leaſes Land for a Year, and ſo from Year to Year quamdiu ambabus Partibus placuerit, (d) it is a Leaſe for two Years at leaſt, Co. 6. The Biſhop of Bath 35. b. implies it. Brook, Tenant per Copy a volunt, &c. in Abridgment. 14 H. 8. 10. Contra Mich. 3 Jac. B.

(d) That it is a Leaſe binding but for one Year, 6 Mod. 215. by Holt, Ch. Juſt.

4. But in that Caſe, after three Years at moſt, it is but an Eſtate at Will, Co. 6. The Biſhop of Bath 35. b.

5. If a Parſon leaſes for a Year, and ſo from Year to Year tam diu, as he ſhall continue Parſon, (e) it is a good Leaſe for two Years at leaſt, if he ſhall continue Parſon. Co. Lit. 45. b.

(e) For this vid. my ſecond Part 195. pl. 8. and the Notes there.

(f) For this vid. Winch 32. and Goſtwick and Maſon, 1 Sid. 423. 1 Mod. 3. 2 Keb. 543. Salk. 413.

6. (f) But after two Years, in the laſt Caſe, it is but an Eſtate at Will, Co. Lit. 45. b.

(g) For Leaſes at Will, vid. 1 Rol. Abr. 858, 859.

* 7. If a Man demiſes Land for ſuch a Term as to both Parties it pleaſes, (g) it is an Eſtate at Will. 6 Co. The Biſhop of Bath 35. b. becauſe the Term is altogether uncertain.

8. If one leaſes for Years, this is a good Leaſe for two Years, by which the plural Number is ſatisfied; in the Caſe of the Biſhop of *Bath*, 6 *Co.* 35. *b.* 36. *a.*

9. If one Leaſes for twenty-one Years, and ſo from twenty-one Years to twenty-one Years, till ninety-nine Years be paſt; tho' no Numbers of twenty-one Years will center in ninety-nine Years, yet this will be a certain Term for ninety-nine Years, and (h) the odd Years ſhall be rejected. *Hill.* 30 & 31 *Car.* 2. between the College of *Mancheſter* and *Trafford*, 2 *Lev.* 241. agreed *per Curiam.*

(i) Noy 143. ſo reſolved per Curiam.

10. If one Leaſes to another *de anno in annum quamdiu ambabus partibus placeret*, tho' this is a Leaſe but for two Years, yet if the Leſſee holds on and occupies part of the third Year, it is then a Leaſe certain for that Year alſo; ſo that (i) neither the one Party or the other can determine

(i) That the Leſſor cannot, for it would be againſt Reaſon, that the Leſſee ſhould occupy after the End of the Years, and be at Coſts in manuring the Land, &c. and then be ouſted, &c. and if the Leſſor would not have had him continue, he ſhould have given him Notice at or before the End of the ſecond Year. Kelw. 65. a. 163. a. b. and vid. Salk.

termine his Will during that Year. *Mich.* 40 *Eliz.* between *Agard* and *King*, *Cro. Eliz.* 775. by *Gawdy* and *Fenner*; but *Popham* held it was a Leaſe at Will after the two firſt Years, and determined by the Death of the Leſſee; *Et adjornatur.*

Salk. 413. —— But where before the End of the ſecond Year the Leſſee hath been at Coſts in manuring, &c. for the following Year, Q. if the Leſſor ought not before ſuch Coſts, &c. to have given the Leſſee Notice to leave, and vid. Salk. 414. —— The Leſſee, after the third Year begun, cannot determine his Will to the Prejudice of the Leſſor, 2 Jon. 5. 6 Mod. 215. Br. Leaſes 53. —— By holding on he is not Tenant at Will, but for a Year certain, for his holding on will be taken to be in Purſuance of the firſt Contract, Salk. 414.

Leaſe for Years.

(B) To whom it may be made in Reſpect of the Eſtate.

1. ONE Jointenant may leaſe for Years to the other, becauſe altho' before he occupied per mie & per tout, yet now he ſhall have the whole without Interruption, and the Leſſor cannot hinder him. (a) 11 H. 6. 34.

(a) Co. Lit. 186. a. S. C. cited, and vid. Ow. 102. My ſecond Part 621. pl. 28. and the Notes there.

Forfeiture.

(C) Of what (b) Eſtate a Forfeiture may be.

(b) If Tenant for Life of a Copyhold, ſurrenders to another in Fee, it is no Forfeiture, 4 Co. 23. a. —So if he ſuffers a Recovery to the Uſe of another in Fee, 1 Mod. 199, 200.

1. (c) LEſſee for Life, Remainder in Tail, Remainder in Fee to the right Heirs of the Leſſee, and he makes a Feoffment, it is a Forfeiture of his Eſtate for Life. 42 E. 3. 18. 50 E. 3. 4.

(c) Poph. 84. S. P.

2. (e) If Tenant in Tail after Poſſibility alien in Fee, or for another's Life, it is a Forfeiture, becauſe he hath in effect but for Life. (f) 39 E. 3. 16. 3 H. 6. 52. (g) 10 H. 6. 1. b. (h) 45 E. 3. 25. 11 H. 4. 15. Littleton 7. b. (i) 29 Aſſ. 64. admitted, 32 Aſſ. 9. admitted by Iſſue, 43 Aſſ. 24. adjudged by Admittance.

(e) Co. Lit. 28. a. S. P. 252. a. S. P. (f) Br. Forfeiture 21. S. C. (g) Fitz. Ayde 67. S. C. (h) Br. Entry Congeable 12. S. C. (i) Fitz. Aſſiſe 292. S. C.

3. (k) A Right to a particular Eſtate may be forfeited, and he that hath but a Right to the Remainder or Reverſion may take Advantage of it. *Co. Lit.* 252. *a.*

(k) 2 Leon. 264.

4. (l) As if Tenant for Life be diſſeiſed, and (m) levies a Fine to the Diſſeiſor, he in Reverſion or Remainder may preſently enter upon the Diſſeiſor for the Forfeiture. *Co. Lit.* 252. *a.*

(l) Buckler's Caſe S. P. 2 Co. 55. b. adjudged, 2 And. 29. adjudged, Moor 423. pl. 59. adjudged, Cro. El. 450, 586. adjudged. (m) So if he accepts of a Fine from a Stranger. 2 Leon. 264.

(a) Buckler's Caſe S. P. 2 Co. 55. b. S. C. adjudged, 2 And. 29. adjudged, Moor 423. pl. 591. adjudged, Cro. El. 450, 586. adjudged.

5. (a) So if after a Diſſeiſin he levies a Fine to a Stranger, though to ſome Reſpects *partes finis nihil habuerunt*, yet it is a Forfeiture of his Right. *Co. Lit.* 252. *a.*

6. So a Forfeiture may be by the Alienation of Tenant by the Curteſy, Tenant in Dower, Tenant *pur auter vie*, Tenant for Years, Tenant by Statute Merchant, Staple, or *Elegit*. *Co. Lit.* 252. *a.*

Eſtate for Life or Years.

Forfeiture.

(D) What Perſon may commit a Forfeiture.

1. If Huſband and Wife, Tenants for Life, make a Feoffment, it is a Forfeiture during the Coverture. 45 E. 3. 21. b. 18 E. 3. 39.

(b) Co. Lit. 326. a. S. P. appears.

2. (b) So it ſhall be a Forfeiture during the Coverture where the Huſband is ſeiſed in the Right of his Wife, and the Huſband and Wife make a Feoffment.

(c) Co. Lit. 326. a. S. P. appears, for in Subſtance this is the Feoffment of the Huſband only.

3. (c) So if Huſband and Wife are Tenants for Life, and the Huſband alone makes a Feoffment, it is a Forfeiture during the Coverture. (d) 29 Aſſ. 43. 43 Aſſ. 17. adjudged, 45. adjudged.

(d) Fitz. Cui in vita 26. S. C.

(e) Co. Lit. 233. b. S. P. 2 Rol. Abr. 796. pl. 11. S. P.

4. (e) But in theſe Caſes it ſhall not be any Forfeiture againſt the Wife after the Death of the Huſband. 45 E. 3. 21. b. 29 Aſſ. 43. adjudged, 43 Aſſ. 17. Co. 8. Whitingham 44. b.

5. But if the Huſband poſſeſſed of a Term in Right of his Wife forfeits the Term, * it ſhall bind the Wife, becauſe he might diſpoſe of the Term at his Pleaſure. (f) 7 H. 6. 2. b. (g) 9 H. 6. 52.

* Fol. 852.

(f) Br. Forfeiture 69. S. C. My firſt Part 703. G 2. S. C.

(g) Br. Forfeiture 76. S. C.

6. If Huſband and Wife, Leſſees for Life, in the Right of the Wife accept a Fine come ceo, &c. of a Stranger, it ſhall not be any Forfeiture againſt the Wife after the Death of the Huſband, becauſe ſhe was not examined on that Fine. Dy. 3, 4 Ma. 148, 89.

7. If an Infant being Leſſee for Life makes a Feoffment in Fee, and the Leſſor enters for the Forfeiture, as he may, (h) this will not bar the Infant but that he may enter. *Co. Lit.* 44. *b.*

(h) Diverſity between expreſs Condition and Condition in Law annexed to an Eſtate, as to binding an Infant or Feme Covert. My ſecond Part, pl. 1, 2. vide, and the Notes there.

8. If the Huſband, after Iſſue, makes a Feoffment in Fee of the Wife's Land of Inheritance, and the Wife dies, the Feoffee ſhall hold it during the Life of the Huſband againſt the Heir of the Wife; for it was no Forfeiture, the Eſtate of the Huſband being only a Tenancy by the Curteſy initiate, and not conſummate. *Co. Lit.* 30. *a.*

Leaſe for Life or Years.

(E) Forfeiture.

By Matter of Record.

1. IF a Man leaſes at Will, and afterwards grants a Rent-charge in Fee to another, it is not any Determination of the Will, admitted. (a) 11 H. 6. 28, 33. But quære, for what Remedy ſhall the Grantee have for the Rent, for he ſhall not diſtrain the Cattle of the Leſſee, if the Leaſe continues, becauſe he comes paramount to the Charge.

(a) Poſt 1 Rol. Abr. 860. Y. 1. *vid.* and the Notes there.

Eſtate for Life or Years.

Forfeiture.

(F) What ſhall be a Forfeiture.

(b) By Matter of Record.

(b) By Matter of Record three Ways, 1ſt, By Alienation. 2dly, By claiming a greater Eſtate than he ought. 3dly, By affirming the Reverſion or Remainder to be in a Stranger. Co. Lit. 251. b.

1. (c) IF Leſſee for Life in a Quid Juris clamat attorn to a Grant by Fine of one who had nothing in the Reverſion, it is a Forfeiture, for he thereby acknowledgeth the Reverſion in a Stranger. (d) 27 E. 3. 77.

(c) Co. Lit. 252. a. S. P. 2 And. 30. S. P. (d) Fitz. Quid Juris clamat 34. S. C.

2. If there be Leſſee for Life, the Reverſion over jointly to Huſband and Wife, and the Huſband alone alters the Reverſion by Fine, and the Conuſee brings a Quid Juris clamat, and the Leſſee attorns to the Grant, it is a Forfeiture to the Wife, and ſhe ſhall have Advantage of it after the Death of her Huſband, becauſe the Leſſee by the Attornment hath acknowledged the Reverſion in a Stranger. (e) 27 E. 3. 77.

(e) Quid juris clamat 34. S. C.

3. (f) If Tenant for Life of an (g) Advowſon in groſs (h) levies a Fine come ceo, &c. of it, it is a Forfeiture, although it doth not deveſt the Reverſion. Trin. 13 Car. B. R. inter (i) Springe and Sir Julius Cæſar, Maſter of the Rolls, adjudged per Curiam without Doubt, and they would not ſuffer it to be argued in a Writ of Error upon a Judgment in Banco, in a Quare Impedit.

(f) Co. Lit. 251. b. S. P. Stil. 192. S.P.

(g) So if of a Rent, Common, or other Things which lie in Grant.

Co. Lit. 251. b. Ow. 147. (h) But a Grant by Deed recorded as a Deed inrolled, works no Forfeiture, becauſe the Deed is the Original. Co. Lit. 251. b. and *vid.* Ow. 147. 2 Leon. 60, 65. 4 Leon. 124, 129. —— But whether it be otherwiſe where Bargain and Sale inrolled in London before the Recorder, according to Cuſtom. *Vid.* Moor 211. pl. 352. Godb. 105. 3 Leon. 169. Goulsb. 40, 41. (i) 1 Jon. 389, 391. S. C. adjudged.

Leaſes

Leaſes for Life or Years.

(G) What ſhall be ſaid a Forfeiture of a Leaſe (a) by Matter of Record.

(a) For moſt of the old Caſes where a Tenant for Life or Years may in a Real Action by Pleading, &c. forfeit his Eſtate, vid. Sir William Pelham's Caſe, 1 Co. 14. Moor 271. 2 Leon. 60. 4 Leon. 123. 1 And. 227. and vid. Godb. 105. Goulſ. 40, 41.

1. If Tenant for Life affirms the Land in a Stranger in a Court of Record, it is a Forfeiture. 13 H. 4. 13. b.

2. (b) If Leſſee for Life accepts a Fine Sur Conuſans de droit come ceo que ad, &c. it is a Forfeiture, for he hath acknowledged by Eſtoppel, that he hath the Fee from him. 1 H. 7. 12. b. Co. 2. Buckler 56. Co. 9. Marg. Podg. 106. b. Vide Dy. 3, 4 Ma. 148, 89.

(b) Co. Lit. 252. a. S. P. and vid. 1 Mod. 117.

* Fol. 853.

* 3. But it is otherwiſe if he accepts a Fine Sur Conuſans de droit tantum with Releaſe, for that enures for the Benefit of the Reverſion, and is no Eſtoppel. 1 H. 7. 12. b.

4. If Tenant for Life hath Aid granted of him in Reverſion, and J. S. comes without Proceſs, and ſays that he is the ſame Perſon of whom Aid is prayed, and is ready to join; to which the Leſſee ſays, that he is not the ſame Perſon; whereupon he is adjudg'd to anſwer alone; it is a (c) Forfeiture if he be the ſame Perſon who hath the Reverſion, becauſe by this Plea he ſuppoſeth the Reverſion in another. 21 E. 3. 14.

(c) By praying in Aid of a Stranger. Co. Lit. 252 a. 2 Co. 55. b. at the Bottom, 2 Leon. 62. Cro. Eliz. 758.

(d) Forfeiture by claiming Fee in a Court of Record. Co. Lit. 251. b. —— If he takes the Tenancy upon him and pleads. 2 And. 30. (e) Br. Quid juris clamat 10. S. C. Fitz. Quid juris clamat 13. S. C.

5. In quid Juris clamat if Leſſee for Life or Years (d) claims Fee, it is a Forfeiture. (e) 11 H. 4. 57. B. Co. 2. Tooker 68. b. 30 E. 3. 29.

(f) Fitz. Quid juris clamat 20. S. C. 1 And. 30. S. C. cited, Goulſ. 41. S. C. cited.

6. So it ſhall be altho' he hath Colour to claim it by void Condition to have Fee. (f) 6 R. 2. Pleſington Quid juris clamat 20. adjudged 19 H. 6. 62.

(g) Br. Quid juris clamat 7. S. C.

7. In quid juris clamat brought againſt one as Tenant for Life of 10 l. Rent, if the Defendant ſays that it is but 40 s. Rent, if it be found againſt him, yet it is not any Forfeiture. (g) 46 E. 3. 27.

(h) Godb. 105.

8. (h) In quid juris clamat, if the Defendant pleads Special Matter of Attainder and Forfeiture of him of whom the Plaintiff claims, and a Grant over by the King, and the Plaintiff ſhews a ſpecial Reverſal of the Attainder, on which the Parties demur, and it is adjudg'd againſt the Defendant, yet it is not any Forfeiture. 29 E. 3. 25.

(i) Holt and Liſter, L. P. Cro. Eliz. 757. adjudged, Ow. 146.

9. (i) In quid Juris clamat if the Defendant be erroneouſly adjudged to attorn to a Stranger, who hath nothing in the Reverſion, and he doth accordingly, it is not a Forfeiture, becauſe it is the Act of the Court. 29 E. 3. 25. b.

(k) Fitz. Quid juris clamat 25. S. C.

10. If Tenant for Life attorns to a Grant by Fine of the Reverſion in Mortmain. (k) 17 E. 3. 7.

11. (a) If a Stranger who hath nothing in the Reverſion brings an Action of Waſte againſt the Leſſee, if he pleads in Bar Nul Waſt fait, it is a Forfeiture, becauſe thereby he affirms the Reverſion in him. 18 E. 3. 54.

(a) Cro. El. 451. S. P. 758. S. P. Co. Lit. 252. a. S. P.

12. If a Man brings a Præcipe in Capite againſt the Leſſee for Life, and him in Remainder in Tail as Jointenants, by the (b) Aſſent and Covin of the Leſſee with the Demandant, and they procure another to anſwer for him in Remainder as Jointenant, and after the Miſe joined they make Default, whereby Judgment final is given againſt them; if he in Remainder reverſe the Judgment by Writ of Diſceit, he ſhall have the Land, for the Leſſee hath forfeited his Eſtate. 17 E. 3. 60. b.

(b) Where ſuch Recovery is had by Agreement and Covin, between the Demandant and Tenant for Life, it is a Forfeiture. Co. Lit. 362. a. and vid. Co. Lit. 356. a. 1 Co. 16. a. 2 And. 30. —— So if Tenant for Life ſuffers a Common Recovery, it is a Forfeiture, for that is an Aſſurance of which the Law takes Notice. Co. Lit. 362. a. Sir William Pelham's Caſe, 1 Co. 15. b. adjudged, Moor 271. pl. 423. adjudged, 2 Leon. 60. 4 Leon. 123. 1 And. 227. and vide 3 Co. 4. b. 10 Co. 44. a. Co. Lit. 356. a.

13. If a Stranger brings a Writ of Entry againſt the Leſſee for Life, ſuppoſing that he holds of his Leaſe, and the Leſſee confeſſeth the Action, whereby the Stranger recovers, it is a Forfeiture to the Leſſor. (c) 5 Aſſ. 3. adjudged.

(c) Fitz. Entry Congeable 42. S. C. Br. Entry Congeable 49. Br. Forfeiture de Terres 29. 1 Co. 15. b. 2 Leon. 60. 4 Leon. 120.

14. In a real Action againſt the Leſſee for Life, if he loſes by Miſpleading, it is not any Forfeiture. 18 E. 3. 28. b.

15. But if the Plaintiff recovers by Render of the Leſſee, it is a Forfeiture. 18 E. 3. 28. b.

16. So if he recovers by nient dedire of the Leſſee. 18 E. 3. 28. b.

17. So if he recovers by Default of the Leſſee. 18 E. 3. 28. b.

18. So if he recovers by Miſpleading of the Leſſee, if he (d) pleads faintly. Contra 18 E. 3. 28. b.

(d) Where he pleads covenouſly to the Diſ-inheriſon of him in Reverſion. Co. Lit. 252. a.

19. As if he pleads to an Inqueſt faintly in a Scire facias, and loſes where he might have barr'd the Demandant by a Plea of nient compriſe, it is a Forfeiture. (e) 22 E. 3. 2. b. Curia.

(e) 2 Leon. 61. S.C. cited.

20. So if Leſſee for Years be ouſted, and brings an Aſſiſe *ut de libero tenemento*. *Co. Lit.* 251. *b.* (f) Or in a Writ of Right brought againſt Leſſee for Life or Years, he joins the Miſe upon the meer Right, which none but Tenant in Fee-ſimple ought to do. *Co. Lit.* 251. *b.*

(f) 1 Co. 16. a. S. P. 3 Leon. 169. S. P.

21. So if Leſſee for Years loſe in a *Præcipe*, and brings a Writ of Error for Error in Proceſs; this is a Forfeiture. *Co. Lit.* 251. *b.*

22. If Tenant for Life bargains and ſells to *A.* and his Heirs, and after levies a Fine *Sur conuſance de droit come ceo, &c.* to *A.* and his Heirs; this is a Forfeiture by the Bargainee, and not by the Bargainor, who at the Time of the Fine had nothing to forfeit. 1 *Leon.* 264. *per Curiam.*

23. If *A.* be Tenant for Life, the Remainder to *B.* for Life, Remainder to *A.* in Fee, and *B.* being in Poſſeſſion, levies a Fine *Sur conuſance de droit come ceo, &c.* to a Stranger, tho' the Remainder in Fee is not touched or diſcontinued thereby; yet it is a Forfeiture, for as much as *B.* had done what he could for diſpoſing of the Fee by Fine. *Mich.* 28 & 29 *Eliz. Braybrook's* Caſe, 1 *Leon.* 40. agreed *per totam Curiam.*

24. If in an Action of Debt brought againſt Leſſee for Years for the Rent reſerved, he claims a Fee by Bargain and Sale to him and his Heirs, upon which Iſſue is joined; if falſe, this is a Forfeiture of his Term, (g) for the very Claim makes it ſo, which cannot be ſaved by the ſubſequent

(g) 4 Leon. 3. to held.

Matter. *Mich.* 29 *El.* between (a) *Dickſy* and *Spencer*, 3 *Leon.* 169. *per Curiam*; but the Cauſe was ended by Compoſition.

(a) Moor 211. pl. 352. S. C. The Bargain and Sale being by Deed inrolled in London, Godb. 105. ſeems to be the S. C. contra, tho' the Iſſue was found againſt the Defendant in the Action of Debt. Goulſ. 40, 41. The Plea in the Action of Debt being entered on Record, and pending that an Aſſiſe of freſh Force brought in London, where the Bargain and Sale was inrolled according to Cuſtom.

25. If in a *Quid juris clamat*, the Defendant pleads he was ſeiſed in Fee *tempore levationis notæ abſque hoc quod ipſe tempore, &c.* held *pro termino vitæ ſuæ tantum*; and Iſſue being thereupon joined, it is found that he held as Tenant after Poſſibility of Iſſue, *&c.* this will excuſe him from attorning, (b) and the Inducement of the Traverſe is no Cauſe of Forfeiture. *Mich.* 39 & 40 *Eliz.* between *Veal & al'* and *Read*, *Cro. El.* 671. agreed *per Curiam.*

(b) Noy 74. S.C. but S. P. as to the Forfeiture does not appear. 11 Co. 80. b. S. C. but S. P. does not appear. 1 Rol. Rep. 179. S. C. cited, but S. P. does not appear.

26. But where there was Tenant for Life, Remainder for Life, and he in Remainder for Life, reciting that he had an Eſtate in Fee, levied a Fine *Sur Conuſance de droit come ceo, &c.* and whether it was a Forfeiture, becauſe it made no Diſcontinuance, *Mich.* 42 *Eliz.* between (c) *Holt* and *Liſter*, *dubitatur*, *Cro. Eliz.* 757. the Court divided.

(c) Ow. 146. S. C. and Court divided, but vid. Buckler's Caſe, 2 Co. 55. b. 2 And. 29. Moor 423. Cro. El. 450, 486.

27. If Tenant for Life levies a Fine *Sur Conuſance de droit come ceo, &c.* to him in Remainder for Life; this is a Forfeiture of both their Eſtates, the one by the Gift, and the other by the Acceptance. *Trin.* 29 *Car.* 2. between (d) *Smith* and *Abel*, 2 *Lev.* 202. adjudged.

(d) 2 Jon. 65. S. C. the Fine being levied by Tenant for Life, and a Stranger to him in Remainder for Life, who agreed thereto and accepted thereof; but there is a Quære by the Reporter, whether any Judgment was given. 3 Keb. 687, &c. S. C.

Leaſes for Life or Years.

Fol. 854.

(H) What Act or Thing ſhall be a Forfeiture.

(e) By Feoffment, Fine, or Recovery, by Conſent. Co. Lit. 251. a. b.

1. **If Leſſee for Life** (e) **aliens in Fee, it is a Forfeiture.** (f) 40 E. 3. 5. 2 H. 4. 20. b.

(f) Fitz. Iſſue 142. S. C.

(g) Co. Lit. 252. a.

(h) Fitz. Iſſue 142. S. C.

2. (g) **So if he aliens for another's Life, it is a Forfeiture.** (h) 40 E. 3. 5.

(i) A particular Eſtate of any Thing which lies in Grant, cannot be forfeited by any Grant by Deed. Co. Lit. 251. b. 2 Leon. 60. —— Otherwiſe if ſuch Grant be by Fine, tho' the Eſtate be not thereby deveſted. Co. Lit. 251. b. Styl. 192.

3. **If Leſſee for Life of a** (i) **Rent grants in Fee, it is not a Forfeiture; for but his own Eſtate paſſeth.** 48 E. 3. 23. b.

4. **So if Reverſioner for Life of Land grants it in Fee, it is not a Forfeiture.** Littleton 137. 48 E. 3. 23. b.

5. If Leſſee for Life of an Advowſon aliens in Fee, it is not a Forfeiture, becauſe this Thing lies only in Grant, and the Eſtate determines by the Death of the Leſſee. 17 E. 3. 19. b. admitted. Contra 43 E. 3. 25. b. 18 E. 3. 16.

6. If Leſſee for Life of a Manor to which an Advowſon is appendant, aliens an Acre with the Advowſon in Fee, it is a Forfeiture of the Advowſon, for the Leſſor may preſent to it after Entry into the Acre, if not before. 18 E. 3. 44. admitted by Iſſue.

7. So if he had alienᵉd the whole Manor with the Advowſon, the Leſſor might enter for a Forfeiture, and ſhould have the Advowſon. 19 H. 6. 33. b.

8. If Leſſor diſſeiſes his Leſſee for Life, and leaſes to another for Life, who leaſes to the firſt Leſſee for Life, it is not any Forfeiture, for nothing paſſed by his Leaſe, for the firſt Leſſee is remitted, and ſo the Livery void; and ſo the ſecond Leſſee hath a Reverſion for Life. 18 E. 3. 48. admitted.

9. If he in Remainder for Life enters and diſſeiſes Tenant for Life, and makes a Feoffment in Fee; this is a Forfeiture of his Right of Remainder. *Co. Lit.* 251. *b.*

10. (a) If Tenant for Life or Years, the Reverſion or Remainder being in the King, makes a Feoffment in Fee; this is a Forfeiture, tho' the Reverſion or Remainder be not deveſted out of the King; and the Reaſon is in Reſpect of the Solemnity of the Feoffment by Livery tending to the King's Diſinheriſon. *Co. Lit.* 252. *b.*

(a) So where there was Tenant for Life, Remainder for Life, Remainder to the King, and the firſt Tenant for Life made a Feoffment. 1 Co. 76. b.

11. If there be Tenant for Life, Remainder in Tail, Remainder in Tail and Tenant for Life, and he in the firſt Remainder in Tail join in a Fine; this is no Forfeiture, for the Law (which abhors Wrong) ſhall conſtrue this firſt to be the Grant of him in Remainder in Tail, and after of the Tenant for Life. *Mich.* 39 *El.* (b) *Bredon's* Caſe, 1 *Co.* 76.

(b) 2 And. 66. pl. 48. S. C. Hob. 277. S. C. cited, and vid. Ow. 130. Ray. 142, 147.

Eſtate for Life or Years.

(I) Forfeiture.

1. IF the Huſband ſeiſed of Land in Right of his Wife, for the Life of the Wife, makes a Charter of Feoffment, whereby he grants the Land to another, to have and to hold to him, his Heirs and Aſſigns, ad ſolum opus & uſum of his ſaid Wife, during the Life of the ſaid Wife, it is not any Forfeiture, for the laſt Words (during the Life of the Wife) ſhall guide all the preceding Sentence, ut res magis valeat quam pereat. Hill. 32 E. B. R. inter (c) Piers Plaintiff, and Alevy and Home Defendants. Dubitatur.

(c) Cro. Eliz. 131. S. C. adjudged by all except Gaudy, that it was a Forfeiture, and Wray ſaid he aſked the Opinion of the Juſtices of his Houſe, and they held it clearly a Forfeiture. 1 Leon. 125. adjudged, and the Opinion of the other Judges mentioned accordingly. Ow. 64. S. C. adjudged, Godb. 141. adjudged, becauſe the Habendum was abſolute, and the Uſe in another Clauſe; and the Law limits the Remainder of the Uſe to the Party who makes the Feoffment. Lane 38. S. C. cited, 1 Rol. Rep. 385. S. C. cited to be adjudged. —— Tenant for Life aliens to B. habendum ibi & heredibus ſuis, for the Life of Tenant for Life; this is no Forfeiture, for the Whole is but the Limitation of the Eſtate. Br. Forfeiture 87.

2. If

2. If Leſſee for Life levies a Fine to B. for the Life of the Leſſee, to the Uſe of B. for his Life, it is not any Forfeiture, becauſe the Eſtate granted by the Fine is but for the Life of the Leſſee, and the Limitation of a greater Uſe cannot be any Forfeiture. Trin. 5 Jac. B. inter (a) Caſtell and Dodd.

(a) Cro. Jac. 200. S. C. and S. P. may from thence be collected.

3. If A. Leſſee for Life, leaſes to B. for the Life of B. if A. ſo long lives, it is a Forfeiture, becauſe B. hath an Eſtate for his own Life. (b) Trin. 5 Jac. B.

(b) Cro. Jac. 200. by the Time ſeems to be S. C. with Difference, tho' I cannot plainly collect the S. P. from it, and vid. that Caſe, 2 Rol. Abr. 781. pl. 7.

4. Husband ſeiſed of Land in Right of his Wife in Tail, and of the Reverſion for another's Life in his own Right, he and his Wife levy a Fine come ceo, &c. and afterwards the Wife dies without Iſſue, the Levying of this Fine is not any Forfeiture, for it is ſtronger, or at leaſt all one with Bredon's Caſe; for the Law conſtrues that each paſſed that which lawfully he might paſs. Mich. 17 Jac. B. adjudged inter (c) Lord Clanricard.

(c) Hob. 273. S. C.

5. If there be Leſſee for Life, Remainder in Tail, Remainder in Fee to the right Heirs of the Leſſee, and the Leſſee makes a Feoffment in Fee, it is a Forfeiture of his Eſtate for Life. (d) 42 E. 3. 18. 50 E. 3. 4.

(d) Ante 1 Rol. Abr. 851. C. 1, S. C.

* Fol. 855.

* 6. If Leſſee for Life makes a Leaſe for Years, and Leſſee for Years afterwards makes a Feoffment in Fee, and afterward Leſſee for Life releaſes all his Right to the Feoffee, it is not any Forfeiture of the Eſtate for Life, ſo that he in Reverſion may enter for a Forfeiture; becauſe the Leſſee for Life hath not done any Act to take the Reverſion out of him in Reverſion in Fee. Mich. 13 Car. B. R. inter Hiblyn and Slack per Curiam, reſolved on Evidence at the Bar.

7. If A. be Tenant for Life, the Remainder to B. in Tail, the Remainder to C. in Tail, the Remainder to the right Heirs of A. in Fee, and A. makes a Feoffment in Fee to B. and his Wife, and afterwards B. dies without Iſſue, and his Wife enters, it is a Forfeiture to C. ſo that he may enter; for this Feoffment by the Entry of the Wife after her Husband's Death, is all one as if A. and B. had aliened to a Stranger, whereby the Remainder to C. would be deveſted. 41 E. 3. 21. 41 Aſſ. 2. adjudged. Co. 1. Bredon 76. b.

8. (e) If Tenant for Life, Remainder for Life, Remainder in Tail, Remainder to the right Heirs of Tenant for Life in Remainder for Life, and afterwards the two Tenants for Life join in a Feoffment in Fee by Deed, it is a Forfeiture of both Remainders for Life, ſo that he in Remainder in Tail may enter for a Forfeiture in the Life of him in Remainder for Life. (f) Dy. 17 El. 339, 44. per Curiam. Co. 1. Bredon 76. b.

(e) Co. Lit. 251. b. 302. b. S. P. becauſe he in Remainder for Life is particeps criminis. 1 Leon. 262.

S. P. 2 And. 66. Cro. Eliz. 253. (f) Martin and Savery ſeems to be S. C. 1 And. 45. pl. 116. adjudged, N. Bendl. 222. pl. 253. adjudged.

9. If there be Tenant for Life, Remainder for Life, Remainder in Tail, Remainder to the right Heirs of him in Remainder for Life, and he in Remainder for Life who hath the Fee expectant levies a Fine come ceo, &c. to another, it is a Forfeiture of his Remainder for Life; ſo that after the Death of the Tenant for Life in Poſſeſſion, he in Remainder in Tail may enter for the Forfeiture, becauſe he is eſtopped by this Fine come ceo, to ſay, but that he paſſed a Fee in Poſſeſſion without any Fraction of Eſtates, for this is not like Bredon's Caſe, for there the Eſtate for Life and Remainder in Tail are immediate the one to the other, and no

Fraction of the Eſtate paſſed; but this Interpretation cannot be made in this Caſe to paſs only an Eſtate in Remainder for Life, and a Remainder in Fee expectant on an Eſtate-tail; and ſo a Fraction of Eſtates, and not an intire Eſtate in Poſſeſſion, according to the Purport of the Fine. Trin. 1650. inter (a) Garret and Blizard, adjudged on a Special Verdict. Intratur Hill. 24 Car. B. R. Rot. 383. This Caſe was adjudged after ſeveral Arguments at the Bar, and after it was argued at the Bench by the Court, and adjudged per totam Curiam præter Jermyn, who argued againſt the Judgment.

(a) Styl. 193, 194. S. C. adjudged.

(K) What ſhall be a Forfeiture in Reſpect of the Perſon to whom it is made.

Who may diſpence with a Forfeiture.

1. IF Leſſee for Life makes a Feoffment in Fee to Husband and Wife in Reverſion ſeiſed in Right of the Wife, it is a Forfeiture to the Wife. 39 E. 3. 29. b. per Thorpe. And ſo the Wife remitted. Contra 39 Aſſ. pl. 7.

2. If Husband and Wife ſeiſed in Right of the Wife, for the Life of the Wife, leaſe by Indenture to him in Reverſion, who is within Age, for the Life of the Husband, it is a Forfeiture; (b) for the Acceptance of the Eſtate by the Infant ſhall not prejudice him. (c) 29 Aſſ. 64.

(b) But if Tenant for Life, and he in Reverſion join in a Fine, and it is after reverſed for the Nonage of the Reverſioner, yet he ſhall not enter for the Forfeiture; becauſe he joined in the Fine, and conſented to it. Piggot and Ruſſel, Cro. Eliz. 124. 2 Leon. 108.

(c) Fitz. Aſſiſe 292. S. C.

3. But where Tenant for Life aliens or makes a Feoffment to him in Reverſion or Remainder, it amounts to a Surrender, and is no Forfeiture. *Co. Lit.* 252. *a.*

4. (d) If Tenant for Life enfeoffs him in Remainder for Life; this is a Surrender, and no Forfeiture. *Co. Lit.* 42. *a.*

(d) Poph. 84. L. P.

5. If Tenant for Life leaſes to him in Reverſion or Remainder, in Tail or Fee, for Life of him in Reverſion or Remainder; this is no Forfeiture, becauſe he in Reverſion, *&c.* was Party, and (e) it cannot be a Surrender, becauſe his whole Eſtate was not given. *Co. Lit.* 42. *a.*

(e) But for this vid. poſt. 2 Rol. Abr. 497. pl. 6 and 8. and the Notes there.

6. If Tenant for Life leaſes for his own Life to the Leſſor, the Remainder to the Leſſor and a Stranger in Fee; this is a Surrender of one Moiety, and a Forfeiture as to the Remainder to the Stranger, the Limitation of the Fee working the Wrong, and when the Leſſor enters, he ſhall take Benefit of it. *Co. Lit.* 335. *a.*

7. If there be Tenant for Life, Remainder in Tail, the Reverſion in Fee, and the Tenant for Life enfeoffs him in Reverſion in Fee; this is a Forfeiture of his Eſtate, and ſhall deveſt the Eſtate-tail. *Chudleigh's* Caſe, 1 *Co.* 140. adjudged.

8. If there be Tenant for Life, Remainder in Tail to an Infant, and they levy a Fine, and it is after reverſed as to the Infant, yet he ſhall

* Cro. El. 124. S. C. adjudged.

not enter for the Forfeiture, becauſe he joined in the Fine, and ſo aſſented to it. *Trin.* 30 *Eliz.* * between *Piggot* and *Piggot*, 2 *Leon.* 108. adjudged.

(L) Who in Reſpect of the Eſtate may diſpenſe.

1. IT ſeems Tenant in Tail in Remainder or Reverſion cannot diſpenſe with a Forfeiture of the Leſſee by Alienation.

2. If there be Tenant for Life, the Remainder in Tail, and he in Remainder * releaſes in Fee to the Leſſee, and afterwards the Leſſee aliens in Fee, it ſeems that he in Remainder cannot enter for the Forfeiture againſt his Releaſe; yet after his Death his Iſſue may enter for the Forfeiture, for now the Releaſe is void. 43 Aſſ. 45. adjudged.

* Fol. 856.

(M) What (a) Act ſhall be a Diſpenſation of a Forfeiture.

1. IF Husband and Wife, ſeiſed in Right of the Wife, for the Life of the Wife, leaſe by Indenture to him in Reverſion for the Life of the Husband, it is not any Forfeiture, for he hath diſpenſed with it by the Acceptance of the Eſtate. (b) 29 Aſſ. 64. per Curiam; and the Reverſion is not diſcontinued.

(a) If Tenant for Life levies a Fine, by which he forfeits his Eſtate; yet if the Reverſioner joins with him in the Declaration of the Uſes, this is a Diſpenſation with a Forfeiture. Styl. 464. per Glyn Ch. Juſt. but vid. 3 Keb. 307.

(b) Fitz. Aſſiſe 292. S. C.

(N) What Thing ſhall excuſe a Forfeiture.

1. IF Husband and Wife are ſeiſed for Life, the Remainder to B. their Son and Heir apparent in Tail, the Remainder to the right Heirs of B. and the Husband makes a Feoffment in Fee to C. with general Warranty, and dies, and afterwards the Wife enters, and ſhe and B. (neither of them, by any Thing appearing, having Knowledge of this Warranty deſcended on B. or of the Feoffment) join in a Feoffment in Fee to D. it is a Forfeiture of the Wife's Eſtate for Life, ſo that C. may enter immediately for this Forfeiture; for the Eſtates in Remainder in Tail and Fee limited to B. were bound by the collateral Warranty, ſo that the Feoffment was made by the Leſſee and another who had nothing in the Reverſion; and altho' the Eſtate of B. was only bound by a Warranty which doth not deſtroy the Right; and altho' the Wife had not any Notice of it, yet foraſmuch as no Body is obliged to give Notice thereof, the Wife ought to take Notice of it at her Peril; and therefore inaſmuch as ſhe join'd with B. in a Conveyance which was voluntary, and did not grant her Eſtate by her-

ſelf,

ſelf, the not having Notice of the Bar of the Eſtate of B. ſhall not excuſe the Forfeiture. Hill. 10 Car. B. R. inter (a) Gimlett and Saundrey, per Curiam, on a Special Verdict. Intratur Trin. 8 Car. Rot. 1000. I my ſelf being de conſilio Querentis.

(a) Cro. Car. 391, 393. S. C. and S. P. per totam Curiam.

(O) What Act or Thing ſhall purge a Forfeiture.

1. (b) IF Leſſee for Life makes a Feoffment on Condition, and enters for it broke; yet the Forfeiture by the Alienation remains, and the Leſſor may enter. (c) 39 Aſſ. 15. adjudged, 43 Aſſ. 47. adjudged.

(b) Co. Lit. 202. b. S. P. 252. a. S. P. and vid. 1 And. 352.

(c) Fitz. Entry Congeable 47. S. C.

2. If Tenant for Life aliens on Condition, that if he himſelf pays 10 l. to the Alienee, that he may re-enter; and if not, that he ſhall have a Fee; and at the Day he pays the 10 l. and re-enters; yet he in Reverſion may enter for the Forfeiture, becauſe by the Alienation the Reverſion was once diſcontinued. 43 E. 3. Entry Congeable 30. adjudged.

3. If a Gift be to Two, and to the Heirs of the Body of one by her Husband begotten, and ſhe who hath but for Life aliens her Part in Fee, and the other enters for a Forfeiture, and afterwards the Husband dies without Iſſue, whereby her Eſtate is determin'd as to that Moiety (admitting it to be Law) quære, Whether ſhe be not Tenant apres Poſſibilitie of that Moiety; yet it ſhall not deveſt the Title executed by the Entry for the Forfeiture. 45 Aſſ. 7.

4. If *A.* being Tenant for Life, leaſes to *B.* for his Life, and *B.* dies, and *A.* re-enters, yet the Forfeiture remaineth. *Co. Lit.* 252. *a.*

Forfeiture.

Fol. 857.

(P) On whom an Entry may be for a Forfeiture.

In Reſpect of the Eſtate.

1. IF Leſſee for Life aliens for Life, the Remainder over, and Remainder enters after the Death of the Leſſee, the firſt Leſſor may enter on him (d) for the Forfeiture; for by Agreement to the Remainder he agreed to the Whole, and ſo a Party. (e) 50 E. 3. 21. b. 43 Aſſ. 17. adjudged, 45 adjudged.

(d) In the Original it is Per.

(e) Fitz. Entry Congeable 36. S. C. Br. Entry Congeable 17. S. C.

2. If the Leſſor may enter on the Alienee of his Leſſee, or any who is Party to the Forfeiture. (f) 50 E. 3. 21. b. 43 Aſſ. 24. adjudged, 25 Aſſ. 11.

(f) Br. Entry Congeable 17. S. C.

3. So

(a) Br. Entry Congeable 17. S. C.

3. So he may enter on the Alienee of the Alienee, or any that hath the Land, altho' he be not Party to the Forfeiture. Contra (a) 50 E. 3. 22. Dubitatur 25 Aſſ. 11.

4. If Leſſee for Life gives in Tail, the Remainder in Fee to another, and afterwards he in Remainder dies, and afterwards the Donee dies without Iſſue, the Leſſor may enter on the Heir of him in Remainder; for by his Entry he agrees to the Diſ-inheritance made by the Alienation. Contra 43 Aſſ. 17. per Finchden.

5. If Tenant for Life gives it in Tail, and the Donee dies, the Leſſor may enter on the Donor for the Forfeiture. Contra 43 Aſſ. 45. per Finchden.

(Q) At what Time he may enter for the Forfeiture.

1. IF Leſſee for Life aliens in Fee and dies, he in Remainder or Reverſion may enter after the Death of the Leſſee. Contra 18 E. 3. 35. 17 Aſſ. 27. Curia.

2. If Tenant for Life of an Advowſon in groſs levies a Fine come ceo, &c. of it, and before any Claim made by him in Reverſion, the Church becomes void; afterwards he in Reverſion ſhall not have Advantage of the Forfeiture as to the preſent Preſentation, becauſe before Election made by him in Reverſion, the Eſtate of the Leſſee was not defeated nor deſtroyed, which Election ought to be by Claim; and then it was a Chattel veſted in the Leſſee before the Election made by him in Reverſion, which cannot be defeated afterwards by the Preſentation of him in Reverſion. Trin. 13 Car. B. R. inter (b) Spring and Sir Julius Cæſar, per Curiam, adjudged in a Writ of Error on a Judgment in Banco in a Quare Impedit brought by the Leſſee. Intratur Mich. 11 Car.

(b) 1 Jon. 389, 391. S. C. adjudged, 2 Rol. Abr. 352, pl. 10. S. C.

3. If *A.* being Tenant for Life, leaſes to *B.* for his Life, and *B.* dies, and *A.* re-enters; yet the Forfeiture remains, and the firſt Leſſor may enter. *Co. Lit.* 252. *a.*

4. If Tenant for Life ſuffers a Common Recovery, and Execution is thereupon had; yet he in Remainder may enter; for being a Forfeiture, the ſuing Execution will not prevent him. *Hill.* 32 *Eliz.* (c) Sir *William Pelham's* Caſe, 1 *Co.* 14, 15. adjudged; tho' it appeared the Recovery was ſuffered before the Statute of 14 *Eliz.*

(c) 2 Leon. 60, &c. S. C. adjudged, 4 Leon. 123, &c. S. C. adjudged, Moor 271. pl. 423. S. C. in which it was adjudged a Forfeiture, but nothing ſaid as to the Entry after Execution upon the Recovery. 1 And. 227. pl. 243. adjudged; but a Writ of Error was after brought, and the Parties agreed, tho' the Chief Juſtice of B. R. was of Opinion the Judgment was good; but the Reporter ſeems to be of another Opinion. Vide.

5. If Tenant for Life bargains and ſells in Fee, and then ſuffers a Recovery, in which he comes in as Vouchee, and after reverſes this Recovery; yet this is a Forfeiture. *Mich.* 14 *Car.* 2. between (d) *L'Eſtrange* and *Temple*, 1 *Sid.* 90. *per totam Curiam*; but there is a *Nota* by the Reporter, that Sir *R. T.* (who I ſuppoſe was in Remainder) entered before the Recovery was reverſed.

(d) Skin. 74. S. C. cited.

(R) What Perſon ſhall take Advantage of a Forfeiture.

Who in Reſpect of Eſtate.

1. IF there be Leſſee for Life, Remainder in Tail, Remainder in Tail, Remainder in Fee to the Leſſee, and the Leſſee enfeoffs the firſt Remainder, if he afterwards dies without Iſſue, the ſecond Remainder may enter for a Forfeiture; for the Feoffment deveſted his Eſtate, and the other could not diſpenſe with the Forfeiture as to him. 41 Aſſ. 2. adjudged, contra (a) 41 E. 3. 21. 25, 34. S. C. Br. Entry Congeable S. C. the Remainder in Tail, and his Wife being enfeoffed, her Husband.

(a) Fitz. Entry Congeable who ſurvived

2. If there be Tenant for Life, Remainder in Tail, Reverſion in Fee, and the Leſſee enfeoffs the Reverſioner, Remainder in Tail may enter for a Forfeiture. Co. 1. Chudleigh 140. adjudged.

3. Leſſee for Life, Remainder in Tail, Remainder to the right heirs of the Leſſee, and he makes a Feoffment, Remainder in Tail may enter. 42 E. 3. 18. 50 E. 3. 3. b. 45 Aſſ. 7.

4. If there be Tenant for Life, the Remainder in Tail, and he in Remainder * releaſes in Fee to the Leſſee, and afterwards the Leſſee aliens in Fee, and afterwards he in Remainder dies, his Iſſue may enter for a Forfeiture, for his Eſtate was not amended by the Releaſe, (and altho' his Father could not take Advantage of it for his Releaſe, yet it is now gone). 43 Aſſ. 45.

* Fol. 858.

5. If Leſſee for Life aliens, he in Remainder in Fee may enter. 17 Aſſ. 27. 18 E. 3. 35.

6. If there be Leſſee for Life, the Remainder in Tail, and the Leſſee aliens, the Remainder may enter for it. 2 H. 4. 20. b. 43 Aſſ. 45. 45 Aſſ. 7. admitted.

7. The ſame Law of a Reverſion in Tail. 3 H. 4. 10.

8. If there be Tenant for Life, Remainder for Life, Remainder in Fee, and the Leſſee aliens in Fee, the Remainder for Life may enter for the Forfeiture. 50 E. 3. 4.

9. And in that Caſe, if the Remainder for Life doth not enter, the Remainder in Fee may enter to the Uſe of Remainder for Life, to defeat the Alienation. 50 E. 3. 4.

10. If there be Tenant for Life, Remainder in Tail, the Remainder in Fee, and Tenant for Life makes a Feoffment, and afterwards (b) he in Remainder in Tail dies, his Iſſue may enter for the Forfeiture. 43 Aſſ. 45.

(b) So if there be Tenant for Years, Remainder for Life, Remainder in Fee, and Tenant for Years aliens in Fee, and then Tenant for Life in Remainder dies, he in Remainder in Fee may enter. Moor 8. pl. 64.

11. So if after the Alienation, he in Remainder in Tail dies without Iſſue, he in Remainder in Fee may enter for the Forfeiture, for his Remainder was deveſted by the Alienation. 43 Aſſ. 45.

12. If a Gift be to Two, and to the Heirs of one, if he who hath but for Life, aliens in Fee, the other who hath the Fee may enter for the Forfeiture. 45 Aſſ. 7. admitted.

13. If the Lord of a Copyhold for Life leaſes for Years to commence at the End, Forfeiture, or Surrender of the Tenant for Life, and afterwards the Tenant for Life commits a Forfeiture by making a Feoffment, if the Lord will not enter for the Forfeiture,

(a) My ſecond Part 198, 199. pl. 3, 4. vid. and the Notes there.

ture, yet (a) the Leſſee for Years may. Paſch. 8 Jac. B. inter Mere and Ridont, per Curiam.

14. If a Gift be to a Feme Covert and J. S. and to the Heirs of the Body of the Feme by her Husband begotten, and afterwards the Husband dies without Iſſue, and afterwards J. S. aliens his Part in Fee, the Wife ſhall not enter into it for a Forfeiture; for by the Death of her Husband without Iſſue, ſhe ought to be Tenant apres Poſſibilitie of the Remainder; but becauſe ſhe was ſeiſed of it per mie & per tout for her Life before, that Eſtate vaniſhed, and ſhe had not any Eſtate in Remainder at the Time of the Forfeiture. 45 Aſſ. 7. adjudged.

15. If Leſſee for Life aliens in Fee, and afterwards he in Reverſion dies, his Heir may enter for this Forfeiture. 27 Aſſ. 32. adjudged, (b) 41 E. 3. 21. b. adjudged, (c) 50 E. 3. 21. adjudged.

(b) Br. Entry Congeable 8. S. C. Fitz. Entry Congeable 34. S. C. Done 7.

(c) Fitz. Entry Congeable 36. Br. Entry Congeable 17. Br.

(d) Buckler's Caſe, S. P. 2 Co. 55. adjudged, 2 And. 29. pl. 19. adjudged, Moor 423. pl. 591. adjudged, Cro. El. 460, 586. adjudged.

16. (d) If Tenant for Life, being diſſeiſed, levies a Fine to the Diſſeiſor, or to a Stranger, he in Reverſion or Remainder (tho' he had but a Right at the Time of the Forfeiture) may preſently enter upon the Diſſeiſor. *Co. Lit.* 252. *a.*

17. Tenant for Life in Remainder may enter for the Forfeiture of the firſt Tenant for Life, or if he makes continual Claim, tho' the Alienee dies ſeiſed, he may enter; and if he dies before, (e) then he in Remainder in Fee may enter in Reſpect of the Privity of Eſtate. *Co. Lit.* 252. *a.*

(e) 2 Leon. 61.

Leaſe at Will.

(S) By what Words it may be created.

1. If a Man commands another to occupy his Land at his Will, it is a Leaſe at Will. 11 H. 6. 33. b.

(f) Styl. 397. S. P.

2. (f) If A. leaſes to B. habendum at the Will of A. it is a good Leaſe at Will, for by Conſtruction of Law it is at the Will of A. and B. forasmuch as a Leaſe at Will is at the Will of the Leſſor and Leſſee, and cannot be at the Will of one only. Co. Lit. 55.

3. So if A. leaſes to B. habendum at the Will of B. it is a good Leaſe at Will; for by Conſtruction of Law it is at the Will of both, for the Reaſon aforeſaid. Co. Lit. 55. Trin. 9 Car. B. R. inter Taylor and Aſhe. Intratur * Paſch. 9 Car. Rot. 412. adjudged, on Demurrer, (g) where it was pleaded, that it was agreed between A. and B. that A. being poſſeſſed of Land for Years, ſhould permit B. to put a Stack of Hay on the Land of A. as long as it pleaſed B. if admitted to be a Leaſe at Will, then it is at the Will as well of A. as of B.

* Fol. 859.

(g) Quere this Tranſlation, for the Original ſeems to be miſ-printed, not being, as I apprehend, perfect Senſe.

4. If A. being poſſeſſed of Land for Years, agrees with B. that he will permit B. to put a Stack of Hay on his Land as long as

as B. pleaſes, (a) it is not any Leaſe of the Land where the Hay is put, but only a Licence. Trin. 9 Car. B. R. inter Taylor and Aſhe, per Curiam.

(a) And if he lets his Land, B. ought to have Notice before the Leſſee puts in his Cattle. Web and Paternoſter, Poph. 151. 2 Rol. Rep. 143, 152. Godb. 282. —— But whether B. ought not to incloſe his Hay for the Preſervation of it. Poph. 151. 1 Rol. Rep. 143, 152. Palm. 71, &c.

(b) Act of the (c) Party.

5. If Leſſor at Will determine the Will, and Leſſee (d) continues Poſſeſſion, and (e) pays the accuſtomable Rent incurr'd afterwards, he is Tenant at Will again. Dy. 2 El. 173. 15.

(b) Ante 1 Rol. Abr. 851. pl. 4, 5, &c. vid. and the Notes there.

(c) Where Tenant at Will being ouſted, and re-entring, ſhall be Tenant at Will again. Vid. Pouſely and Blackman, Cro. Jac. 659. 2 Rol. Rep. 141. Palm. 201. Bridg. 12, &c. 4 Mod. 48. (d) If Tenant for Years holds over, and continues Payment of his Rent as before; this Payment and Acceptance amounts to a Tenancy at Will. All. 4. and vid. 1 Brownl. 30, 43. (e) Where one entring by Wrong after Payment of Rent, is no Diſſeiſor, but Tenant at Will. My firſt Part 629. pl. 6, 7. and the Notes there.

6. If a Man makes a Deed of Leaſe for Life, and bids him enter into the Land according to the Deed, without making any Livery, (it ſeems intended to be (f) out of the Land, and ſo no Livery in the View) it is a good Leaſe at Will, becauſe he hath agreed that the Leſſee ſhall have an Eſtate, and he can have no other Eſtate without Livery. 18 H. 6. 16. b.

(f) But if within View of Land, it ſeems to amount to a Livery, if the Leſſee after enters. Co. Lit. 57. a. but for this vid. poſt. 2 Rol. Abr. 6. pl. 1, 2, &c. and the Notes there.

7. (g) If a Man delivers a Deed of Feoffment to another, the Leſſee is Tenant at Will till Livery made, for he hath ſhewn his Will by Delivery of the Deed, that he ſhall have the Land.

(g) Diverſity between a Deed made by the Agreement of the Parties, which ſtands not with the Rule of Law, and a Grant good in its Commencement, but to be perfected by a ſubſequent Ceremony, as in Caſe of a Charter of Feoffment, and the Feoffee enters before Livery, he is a Tenant at Will, and not a Diſſeiſor; for which vid. my ſecond Part 630. pl. 9. and the Notes there. —— But quere, where Bargain and Sale before Inrolment. March 62, 70.

8. But it ſeemeth if a Man delivers a (h) Deed of Feoffment to A. which purports a Feoffment in Fee to A. to the Uſe of B. there A. ſhall not be Tenant at Will till Livery made, for it appears that the Intent was, that he ſhould have nothing to his own Uſe.

(h) But if a Leaſe for Years be made to A. and delivered to B. to the Uſe of A. and B. enters to the Uſe of A. if B. be ejected, A. may have an Ejectment. Noy 43.

9. So it ſeems in that Caſe Ceſtuy que Uſe ſhall not be Tenant at Will, for he can take nothing by the Intent of the Deed but that which was before in the Feoffee.

10. If a Man covenants to permit and ſuffer another to have, hold, and enjoy certain Land a die Datus for Life, it is but a Covenant and no Leaſe, and ſo the Law will not expect any Livery, and therefore he ſhall not be Tenant at Will. Trin. 5 Jac. B. R. inter (i) Tooker and Squier.

(i) 1 Rol. Abr. 848. pl. 3. S. C.

11. Before 27 H. 8. of Uſes, if a Man had made a Feoffment of Land to his own Uſe, and afterwards the Feoffee ſuffer'd him to take the Profits, yet he was not Tenant at Will, (k) but only at Sufferance. 17 H. 7. Kelleway 41. b. 42. Vide Littleton, Sect. 462.

(k) Dy. 57. b. pl. 1.

12. If A. bargains and ſells Land to B. by Way of Mortgage, on Condition to pay certain ſeveral Sums yearly for ſix Years following; and in the Deed there is ſuch Covenant: And it is covenanted

nanted and agreed between the Parties, that the Bargainee ſhall not take any Profits of the Land till there be Default of ſome of the Payments aforeſaid; this will not make any Leaſe at Will, becauſe it is not that the Bargainor ſhall take the Profits, but only that the Bargainee ſhall not take them, which ſounds in Covenant, and ſo he is Tenant at Sufferance and not Tenant at Will.

(a) Cro. Jac. 659. S. C. but not S. P. but rather the contrary to be collected. 2 Rol. Rep. 141, &c. 284. S. C. and S. P. Palm. 201, &c. Bridg. 12, 13, &c. and vid. 4 Mod. 48. My ſecond Part 629. pl. 3.

Mich. 20 Jac. B. R. inter (a) Powſeley and Blackman, per Curiam.

13. If Tenant for Years of a Meſſuage grants *totum Meſſuagium ſuum*, the Grantee hath but at Will; but if he grants all his Intereſt in the Meſſuage, the whole Term paſſes. *Trin.* 31 *El.* 2 *Leon.* 78. *pl.* 102. ſaid to have been ſo adjudged.

14. If one leaſes for one Year, and from thence for nine or twelve Years, as ſhall be agreed by a Stranger, and there is no Agreement, but the Leſſee continues in Poſſeſſion after the Year, he is Tenant at Will; for it appears that it was the Will of the Leſſor, that the Leſſee ſhould have the Land, tho' no certain Term of Years is nominated, and a bare Agreement makes a Tenancy at Will. *Paſch.* 1659. between *Bedford* and *Johnſon*, 2 *Sid.* 153. adjudged.

(T) In what Manner a Leaſe at Will may be made.

By Act in Law.

1. If the Grandfather enjoys the Land of the Son for Cauſe of Nouriſhment, he is Tenant at Will. 43 E. 3. 7.

* Fol. 860.

* 2. If the King grants Land to another and his Heirs Male, this Grant is void for the Incertainty, and the Grantee ſhall not be Tenant at Will. 18 H. 8. §. Co. 1. Alton Woods (b) 43 b. Da. 1. 43.

(b) Davis 43. S. C. cited.

3. So if the King grants Rent or Land, without limiting any Eſtate, the Grant is void for the Incertainty, and the Grantee ſhall not be Tenant at Will. Da. 1. Dean and Chapter Fernes 45. Contra 17 E. 3. 45.

4. If the King grants Land probis Hominibus de D. rendring Rent, (c) they are Tenants at Will. Dy. 1 Ma. 100. Da. 1. 43. b.

(c) That they are thereby a Corporation for this Purpoſe, vid. my ſecond Part 214. pl. 4. and the Notes there.

5. If the King grants an Office to another at Will, and (d) grants a Rent to him for executing the Office for his Life, yet it is determinable on the Determination of the Office. Co. Lit. 42.

(d) But vide the Caſe of Sir Charles Howard, Cro. Car. 59, 61. 1 Jon. 151, 152. Hutt. 86.

6. If one leaſes for 100 Years in Truſt, to attend the Inheritance, and, being the *Ceſtui que Truſt*, continues in Poſſeſſion notwithſtanding, he is Tenant at Will to the Leſſee. *Trin.* 19 *Car.* 2. between (e) *Barns* and *Freeman*. 1 *Sid.* 349. but the *fol.* miſ-printed, reſolved.

(e) Cart. 161, &c. 195, &c. S. C.

(U) Out of what Eſtate it may be made.

1. IF the King ſeiſes Land of Priors aliens by Reaſon of War, he may leaſe it at Will. 17 E. 3. 2. 17. b.

(X) To whom it may be made.

In Reſpect of Eſtate.

1. (a) A Jointenant in Fee cannot leaſe at Will to his Companion, becauſe by the Law they hold per mie & per tout, and the one may take all the Profits, and the other hath no Remedy. (b) 11 H. 6. 34. (But quære, for if one takes all the Profits, it is a Tort, and the other may take all from him, and this Leaſe at Will takes away both thoſe.)

(a) In the Caſe of James and Portman. Ow. 102. Cro. El. 314. S. P. contra per Curiam.

(b) Co. Lit. 186. a. S. C. cited, and vid. my ſecond Part 621. pl. 28. and the Notes there.

Leaſe at Will, Determination.

(Y) What Act ſhall be a Determination.

1. IF a Man leaſes Land at Will, and afterwards grants a Rent-Charge in Fee to another, it is not any Determination of the Will, admitted 11 H. 6. 33. (But quære, for what Remedy ſhall the Grantee have for the Rent, for he ſhall not (c) diſtrain the Cattle of the Leſſee if the Leaſe continues, becauſe it was paramount the Charge.)

(c) My ſecond Part 641. pl. 25, 26.

2. If Leſſor at Will of Black-acre covenants with a Stranger to make a Feoffment to him of it, it is not any Determination of the Will till the Feoffment made, for notwithſtanding the Covenant, perhaps he never will make the Feoffment. Mich. 38, 39 El. B. R. per Gawdie.

3. If Leſſor at Will enters into the Land without the Aſſent of the Leſſee, and cuts down a Tree, it is a Determination of the Will, becauſe otherwiſe it would be a Wrong in the (d) Leſſor. Co. Lit. 55. b.

(d) Unleſs the Trees are excepted. Co. Lit. 55. b.

4. If a Man leaſes at Will a Manor to which a Common is appendant, and afterwards puts in his Cattle to uſe the Common, it is a Determination of the Will. Co. Lit. 55. b.

5. The Leſſor may by actual Entry into the Land determine his Will in the Abſence of the Leſſee, but by Words ſpoken off of the Land, the Will is not determined till the Leſſee hath Notice. Co. Lit. 55. b.

6. If Tenant at Will (a) cuts down Timber-Trees, or voluntarily pulls down or proſtrates Houſes, it determines the Will, and the Leſſor may have Treſpaſs for it. Mich. 28, 29 El. B. inter Walgrave and Somerſet, Rot. 318. adjudged, cited Co. Lit. 57.

(a) For when Tenant at Will takes upon him to do ſuch Acts which none can do but the Owner of the Land, theſe amount to a Determination of the Will and of his Poſſeſſion, ſo that the Leſſor may have a general Action of Treſpaſs without any Entry. 5 Co. 13. b. Cro. El. 777. but for this vid. 2 Roll. Abr. 555. Y. 6. and the Notes there.

7. If Tenant at Will grants over his Eſtate to another, altho' it * be a (b) void Grant, yet it amounts to a Determination of his Will. Co. Lit. 57.

* Fol. 861.

(b) That Leſſee at Will cannot grant over his Eſtate, and if he doth, or leaſes for Years, the Grantee or Leſſee are Diſſeiſors or not, at the Election of the firſt Leſſor, vid. my ſecond Part 629. pl. 2, 3. and the Notes there, and 1 Brownl. 30, 43. 2 Rol. Rep. 242, 243. 4 Leon. 35. 3 Mod. 150. Bams and Freeman, 1 Sid. Cart. 161, &c. 195, &c.

8. If the Leſſor having taken a Diſtreſs for his Rent, impounds it on the Land, it is a Determination of his Will. *Co. Lit.* 57. *b.*

9. If the Leſſor makes a Leaſe for Years to commence preſently; but it is agreed between the Leſſor and Leſſee for Years, that the Leſſee for Years ſhall not enter till after the Day upon which the Rent upon the Leaſe at Will would become due; yet this is ſuch a Determination of the Will, that no Action will lie for this Rent. *Paſch.* 25 *Car.* 2. between (c) *Dinſdale* and *Iſles.* 2 *Lev.* 88. adjudged in an Action brought for the Rent.

(c) Raym. 224. S. C. adjudged in an Action of Treſpaſs. Hinchman and Iles, 1 Vent. 247. S. C. adjudged in Replevin. 3 Keb. 166, &c. S. C. by which it appears that the Leſſee for Years had entered contrary to his Agreement.

(Z) What Act in Law.

1. (d) If the Leſſor at Will be outlawed in a Perſonal Action, (e) the Will is determin'd, for the King ſhall have the Profits afterwards. Co. 5. Oland. 116. b. 9 H. 6. 21.

(d) 2 Rol. Abr. 807. pl. 4. vid. and the Notes there.

(e) Not till Seiſure. 1 Vent. 248. per Hale. —— And in Caſe of an Extent, not until the Liberate. 1 Vent. 248. per Hale.

2. If Leſſee at Will be outlawed in a Perſonal Action, the Will is determined by it. Co. 5. Oland. 116. b.

(f) 5 Co. 11. a. S. P. agreed per totam Curiam, and

3. (f) If a Woman leaſeth at Will rendring Rent, and afterwards taketh Husband, it doth not determine the Leaſe, but the Husband and Wife ſhall have an Action for the Rent. Co. Lit. 55. b.

that, unleſs by expreſs Matter done by the Husband after the Marriage, the Will is not determined. Cro. Car. 304. S. P. and vide Kelw. 163.

(g) 5 Co. 11. a. S. P. Cro. Car. 304. S. P. Kelw. 163.

(g) 4. So if a Leaſe at Will be made to a Woman rendring Rent, who takes Husband, this doth not determine the Leaſe, but an Action lies againſt them for the Rent, or a Diſtreſs. Co. Lit. 55. b.

(h) Co. Lit. 11. b. S. P.

(h) 5. So if Husband and Wife leaſe at Will the Land of the Wife, rendring Rent, and the Husband dies, yet the Leaſe ſhall continue. Co. Lit. 55. b.

(i) 5 Co. 11. a. S. P. and vid. Dyer 269. pl. 20.

(i) 6. So if a Leaſe at Will be made by Two to Two, and afterwards one of the Leſſors or Leſſees ſhould die, the Leaſe at Will is not determined in either of theſe Caſes. Co. Lit. 55. b.

7. If one leaſes to another, to hold to him and his Heirs, at the Will of the Leſſor; yet if the Leſſee dies, the Leaſe is determined, and if his Heir enters, he is a Treſpaſſer, for the Words, *To the Heir of the Leſſor*, are void. *Lit. Sect.* 82.

Eſtate at Will.

(A) Who may determine it.

1. If a Stranger enters on my Tenant at Will and ouſts him and diſſeiſes me, (a) yet it is not any Determination of the Will, but my Tenant at Will may well re-enter (b). Mich. 3 Jac. B. R. inter (c) Carpenter and Collins, by Two againſt one, and that he is chargeable to the Leſſor for the Rent afterwards.

(a) Otherwiſe if the Entry be by Title. Moor 775.

(b) That he may re-enter, the Point had been controverted. ——— And when he hath re-entered, he is Tenant at Will again. Blackman, Cro. Jac. 659. 2 Rol. Rep. 141. Palm. 201. Bridg. 12, &c. 4 Mod. 48. S. C. Moor 774. pl. 1069. S. C.

(c) Yelv. 73. becauſe he had the primer Poſſeſſion. Style 250, 251. per Rolle Ch. Juſt. and Nichol Juſt. tho' formerly Pouſely and

Tenant at Will.

(B) At what Time it may be determined.

1. A Tenant at Will rendring Rent cannot determine the Will a Day before the Rent-Day, and ſo avoid the Payment of the Rent. Dubitatur Mich. 3 Jac. B. R. inter (d) Carpenter and Collins.

(d) Yelv. 73. S. C. and S. P. Moor 774. pl. 1069. S. C. but S. P. does not appear. 1 Brownl. 88, 89. S. C. 3 Mod. 150. S. C. cited.

2. If Tenant at Will, rendring an yearly Rent, begins a new Quarter, and voluntarily determines his Will before the Quarter ended, (e) yet he ſhall pay the Rent for that Quarter. *Mich.* 22 *Car.* 2. *All.* 4. in Sir *Thomas Bowe's* Caſe, agreed *per Curiam* on a Trial at Bar.

(e) Kelw. 65. b. 1 Sid. 339. 2 Keb. 260. Salk. 413.

At

At Will, Determination.

(C) How it may be determined.

1. A Tenant at Will cannot determine his Will ſecretly without (a) Notice given to the Leſſor. Mich. 3 Jac. B. R. inter (b) Carpenter and Collins.

(a) According to Br. Leaſes 53. he ought to have half an Year's Warning; but I ſuppoſe this is intended by the Cuſtom of London, for which vide 2 Keb. 260. Skin. 649. and my ſecond Part 422. pl. 9. and the Notes there. (b) Yelv. 73. S. C. S. P. Moor 774. pl. 1069. S. C. but S. P. does not appear. 1 Brownl. 89. S. C.

2. The Leſſor may by actual Entry into the Ground determine his Will in the Abſence of the Leſſee, but by Words ſpoken from off the Ground the Will is not determined, till the Leſſee hath Notice. *Co. Lit. 55. b.*

(D) (c) Tenant at Sufferance.

(c) There is a great Diverſity between Tenant at Will and Tenant at Sufferance, for a Tenant at Will is always by Right, and a Tenant by Sufferance enters by a lawful Leaſe, and holdeth over by Wrong. Co. Lit. 57.

1. (d) If the (e) King's Leſſee for Years holds over his Term, yet he is not any Tenant at Sufferance, but an Intruder, becauſe no Laches of Entry can be imputed to the King. Co. Lit. 57. b.

(d) For this vide my ſecond Part 631. pl. 9. S. C. (e) Otherwiſe if the Leſſee of a Subject holds over, for which vide my ſecond Part, and the Notes there. —— But if Tenant pur auter vie leaſes for Years, and dies, the Leſſee, being in Poſſeſſion, ſhall be the Occupant, for which poſt. 2 Rol. Abr. 351. and the Notes there.

2. If a Man leaſes at Will and dies, and afterwards the Leſſee continues Poſſeſſion, altho' the Leaſe was determined by the Death of the Leſſor, yet the Leſſee is Tenant at Sufferance. Co. Lit. 57. b.

(f) Co. Lit. 271. a. S. P. 2 Inſt. 134. S. P.

3. (f) If a Guardian after the full Age of the Heir continues in Poſſeſſion, he is not Tenant at Sufferance, but an Abator, becauſe his Eſtate is created by Act in Law. Co. Lit. 57. b.

Where (g) an expreſs Eſtate-tail or other Eſtate ſhall not be altered or enlarged by Implication.

(g) And where the Words are expreſs, there ſhall be no further Implication, vide the Caſe of Higham and Baker, Cro. El. 16. Moor 123. pl. 269.

IF one deviſes to *A.* and the Heirs Male of his Body, & *ſi obiret ſine hærede de corpore ſuo*, Remainder, &c. *A.* hath not an Eſtate in general Tail, but to the Heirs Male of his Body only. *Paſch.* 4 & 5 *Ph.* & *Mar.* between (h) *Tuck* and *Frencham*, *Moor* 13. *pl.* 50. adjudged.

2 Leon. 226. 3 Leon. 130. Godb. 16. and vide Moor 7. pl. 24. Pemman and Prene, Palm. 11. 303, 305. Bridg. 14, 15. 2 Rol. Rep. 256. My firſt Part 514. pl. 3. — And where an expreſs Eſtate is given, there ſhall be no further by Implication. Gilbert and Witty, Cro. Jac. 656. 2 Rol. Rep. 282. (h) 1 And. 8. S. C. adjudged, Dyer 171. a. S. C. N. Bend. pl. 114. S. C. adjudged, Bird. 2. S. C. cited, Palm. 135. S. C. cited, 1 Bulſt. 223. S. C. cited, 4 Mod. 318. S. C. cited.

2. If a Copyholder ſurrenders to the Uſe of his Will, and after deviſes Part to *A.* other Part to *B.* and the Reſt to *C.* and if *A. B.* and *C.* live till of Age, and have Iſſue, then to them and their Heirs, to give and ſell at their Pleaſure; and if one of them die without Iſſue, Wills that the other or others ſhall have all the Lands; and if all die without Iſſue, that his Executors ſhall ſell the ſame, and give the Money to the Poor; by this Deviſe, *A. B.* and *C.* when they are of Age, and have Iſſue, have a Fee; and ſuch Eſtate being given them by expreſs Words, it ſhall not be altered by the ſubſequent. *Trin.* 27 *Eliz.* between *Brian* and *Cauſen*, 2 *Leon.* 68. adjudged, 3 *Leon.* 115. adjudged.

3. If one deviſes Lands to *J. S.* and the Heirs of his Body, and after the Death of *J. S.* to the eldeſt Son of *J. S.* and the Heirs of his Body, the Remainder over to three other of his Sons in like Manner, *J. S.* hath an Eſtate-tail, for by the firſt expreſs Words ſuch Eſtate is given, and the ſubſequent Words do not correct or alter them. *Mich.* 33 *El.* between (a) *Atkins* and *Atkins*. *Cro. El.* 248. adjudged.

(a) Moor 593. pl. 801. S. C. adjudged, 1 And. 33. S. C. adjudged, N. Bendl. 207. pl. 244. S. C. adjudged.

4. If one having two Sons *B.* and *C.* deviſes Lands to *B.* for fifty Years, if he ſo long lives, and as to the Inheritance after the Term, deviſes it to the Heirs Male of the Body of *B.* and for Want of ſuch Iſſue to *C.* *B.* hath not an Eſtate-tail by Implication upon the Words *without Iſſue*, becauſe an Eſtate for Years was given him by expreſs Words, and the Court cannot make a Conſtruction contrary thereto, which muſt drown the Term for Years, and make an Eſtate of Inheritance. *Hill.* 5 *Will.* between (b) *Goodright* and *Corniſh*, *Salk.* 216.

(b) Comb. 254. S. C. adjudged, 4 Mod. 255, 256. S. C. adjudged.

5. If *A.* deviſes to *B.* for Life, Remainder to the firſt Son of *B.* in Tail Male, and ſo on to the 10th Son of *B.* in Tail Male, and if *B.* dies without Iſſue, the Remainder over, and *A.* by a Codicil recites, that he had given to *B.* an Eſtate-tail, yet *B.* hath not an Eſtate-tail; for a particular Eſtate being expreſly deviſed, the contrary ſhall not be implied by Implication, though objected he might have poſthumous Children, and more than ten Sons, and Dying without Iſſue Male will be intended ſuch Iſſue Male. *Hill.* 2 *Ann.* between (c) *Popham* and *Bampfield*, *Salk.* 236. and it was ſaid there was a mighty Difference between a Deviſe to *A.* and if he dies without Iſſue, to *B.* and a Deviſe to *A.* for Life, and if he dies without Iſſue, to *B.*

(c) Bampfield and Popham S. C. 2 Vern. 427, 449. but there it appears the Deviſe was to Truſtees in Truſt for B. for Life, and to his firſt and other Sons in Tail, and being objected, that the Teſtator in his Codicil had recited, that he had given an Eſtate-tail, it was anſwered, that this in common Parlance was taken to be ſuch.

Croſs Remainders.

By (d) (e) Implication.

1. IF one having five Sons, deviſes two Parts in Three of his Lands to his four younger Sons, and the Heirs Male of their Bodies, and if they all Four happen to die without Iſſue Male of their Bodies, or of any of their Bodies, then he Wills the ſame ſhall return to his Heirs upon the Death of any of them without Iſſue, the Survivor or Survivors ſhall have an Eſtate-tail in the intire two Parts, and no Part of the two Parts ſhall return to the Heir ſo long as there is any Iſſue of any of them. (f) *Mich.*

(d) Where the Words, That each ſhall be Heir to the other, make Croſs Remainders, vide Hob. 32. Wood and Ingorſal, Cro. Jac. 260.

1 Bulſt. 62. and vide Ow. 25. 1 And. 38, 194. Savil 92. Cro. Jac. 695. Moor 637. Raym. 455. (e) Not in a Deed, Co. Lit. 25. b. 1 Rol. Abr. 837. R. 2. (f) Hob. 33. S. C. cited.

13 & 14 *El. Dyer* 303. *pl.* 49. adjudged, and ſaid the Intention of the Deviſor was ſo, if the Words be well conſidered.

2. If one having Iſſue three Sons *A. B.* and *C.* deviſes one Houſe to *A.* and his Heirs, another Houſe to *B.* and his Heirs, and a third Houſe to *C.* and his Heirs, provided that if all his ſaid Children ſhall die without Iſſue, then all the ſaid Meſſuages ſhall remain and be to his Wife and her Heirs; if one of them dies without Iſſue, the Wife may enter on his Houſe, for here are no Croſs Remainders from one Son to another, becauſe being deviſed to them ſeverally by expreſs Limitation, there ſhall be no greater Eſtate to them by Implication. *Hill.* 20 *Jac.* between (a) *Gilbert* and *Witty*, *Cro. Jac.* 655. adjudged by *Dodderidge*, *Houghton* and *Chamberlain*, *Lea* Ch. Juſt. doubting, and *Dodderidge* ſaid, tho' perhaps Croſs Remainders may be by Implication, (b) where there is a Deviſe to two ſeveral Perſons, yet not ſo if to more, for when one dies there cannot be ſeveral Eſtates by Moieties to ſeveral Perſons, and when another dies, Remainder again to another, becauſe of the Uncertainty and Inconvenience, and that it was never ſeen in any (c) Book where an Eſtate is limited to divers, that there could be Croſs Remainders.

(a) 2 Rol. Rep. 281, 282. adjudged accordingly, and Dodderidge ſaid, the Law would never endure Croſs Remainders between Three, becauſe of the Confuſion it would make.

(b) As 4 Leon. 14. ſo Holms and Meynel, Raym. 452. adjudged per tot' Cur', 2 Jon. 172. adjudged per tot' Cur', Pemberton Ch. Juſt. delivering their Opinion, who agreed with Dodderidge in the Diverſity taken; but the Reporter did not approve of this Difference, ſaying the Pregnancy of the Implication might be explained by expreſs Limitations, which it was the Office of the Judges to do when the Intent appeared. Skin. 17, 18. adjudged per tot' Cur', it being in a Will, tho' Pemberton ſaid it would be otherwiſe in Caſe of a Grant, 2 Shor. 136. adjudged, and Difference taken where in a Conveyance and where in a Will. Pollexf. 434. adjudged, and the Diſtinction agreed, where the Deviſe is to two Perſons and where to Three, or more, and vide 2 Jon. 80. Cro. Jac. 448. 2 Rol. Abr. 416. pl. 3. Dyer 326. a. Cart. 93, 174. Fitz. 97, 8, &c. the Argument in the Caſe of Shard and Weigh. (c) See Dyer 303. pl. 49. the Caſe ut ſupra.

Tenant in Tail (d) after Poſſibility of Iſſue extinct.

(d) As an Eſtate-tail was originally carved out of a Fee-ſimple, ſo is this Eſtate out of a Special Tail. Co. Lit. 28. a.

1. IF the King gives Lands to a Man and Woman, and the Heirs of their two Bodies, and the Woman dies without Iſſue, the Man ſhall be Tenant in Tail after Poſſibility, &c. *Co. Lit.* 21. *b.*

11 Co. 80. a. Ray. 414. — At Common Law he had a Fee. 1 Rol. Rep. 184. per Coke. — Tho' the Inheritance be altered, yet the ſame Freehold continues. Co. Lit. 154. b. 11 Co. 81. a. 1 Rol. Rep. 179. Ray. 414.

2. But if the King gives Lands to a Man with a Woman of his Kindred in Frank-marriage, and the Woman dies without Iſſue, the Man ſhall not hold for his Life, becauſe the Woman was the Cauſe of the Gift, but otherwiſe in (e) Caſe of a common Perſon. *Co. Lit.* 21. *b.*

(e) Co. Lit. 28. b.

3. If Lands are given to a Man and his Wife, and the Heirs of their two Bodies, and they both live till they are 100 Years old, they continue Tenants in Tail, for that the Law ſees no Impoſſibility of their having Children. *Co. Lit.* 28. *a.*

4. But where one of them dies without Iſſue, the Law ſees an apparent Impoſſibility that any Iſſue, which the Survivor can have, ſhall inherit, and therefore he is Tenant after Poſſibility, &c. *Co. Lit.* 28. *a.*

5. If a Feoffment be made to the Uſe of *B.* and his Wife for their Lives, and after to the Uſe of their next Iſſue Male to be begotten in Tail, and after to the Uſe of *B.* and his Wife, and the Heirs of their two Bodies, (they having no Iſſue Male at that Time) by which they are Tenants in Special Tail executed, and they after have Iſſue a Son, and ſo they become Tenants for Life, Remainder to the Son in Tail; if *B.* dies having no other Iſſue, and the Son after dies without Iſſue, (f) the Wife ſhall have the Privileges belonging to a Tenant after Poſſibility, &c. tho' ſuch

(f) That ſhe is not Tenant after Poſſibility, &c. vide Lewis Bowle's Caſe 11 Co. 79. b. 80, &c. adjudged, 1 Rol. Rep. 177, &c. adjudged.

Eſtate muſt be created by the Act of God, and not by the Limitation of the Party *ex proviſione Legis*, and not *ex proviſione Hominis. Co. Lit.* 28. *a.*

6. If Lands are given to *B.* and his Wife, and the Heirs of their two Bodies, and they are divorced *cauſa præcontractus* or *Conſanguinitatis*, their Eſtate of Inheritance is turned into a joint Eſtate for Life; and tho' they once had an Inheritance, yet for that their Eſtate was altered by their own Act, and not by the Act of God, *viz.* the Death of either Party without Iſſue, they are not Tenants in Tail after Poſſibility, *&c. Co. Lit.* 28. *a.*

7. One may be Tenant in Tail in Remainder as well as Poſſeſſion; and therefore if a Leaſe be made to one for Life, Remainder to Husband and Wife in ſpecial Tail, and the Husband dies without Iſſue, the Wife is Tenant after Poſſibility, *&c.* of this Remainder; and if the Tenant for Life ſurrenders to her, ſhe is Tenant in Tail after Poſſibility, *&c.* in Poſſeſſion. *Paſch.* 13 *Eliz.* in *Bowle's* Caſe, 11 *Co.* 81. agreed *per Curiam.*

8. If Husband and Wife are Tenants in Special Tail, to them and the Heirs of their two Bodies, Remainder to the Heirs of the Husband, and they having Iſſue, the Husband levies a Fine with Proclamations, and dies, and the Wife within five Years after his Death enters, tho' the Iſſue is barred by the Fine, becauſe he (a) muſt make himſelf Heir of both their Bodies, yet the Wife is not, and (b) therefore hath the Eſtate-tail, and not an Eſtate as Tenant after Poſſibility, or barely for Life only, diſpuniſhable of Waſte, *&c. Paſch.* 10 *Jac.* (c) *Beamont's* Caſe, 9 *Co.* 140. reſolved.

(a) Dal. 50. 8 Co. 72. b.
(b) Cro. Car. 478. 1 Jon. 393, 394.
(c) 2 Inſt. 681, 682. S. C. and there it is ſaid, that it was reſolved and adjudged, that the Eſtate of the Wife was changed to an Eſtate for Life diſpuniſhable of Waſte.

Tenant in Tail after Poſſibility of Iſſue extinct.

The Privileges of ſuch Eſtate.

1. SUCH Tenant hath eight Qualities and Privileges which Tenant for Life hath not. *Co. Lit.* 27. *b.*

(d) As firſt, he is diſpuniſhable of Waſte. *Co. Lit.* 27. *b.* (d) 11 Co. 80. a. S. P. but for this vid. 2 Rol. Abr. 826. pl. 1. 828. pl. 12. and the Notes there.

(e) 2dly, He ſhall not be compelled to attorn. *Co. Lit.* 27. *b.* 316. *a.* (e) 11 Co. 80. a. S. P. 1 Rol. Rep. 179. S. P. 184. S. P. Veal and Road & al' S. P. Cro. El. 671. admitted, Noy 74. admitted, 1 Rol. Rep. 171. S. C. cited, but for this vide my firſt Part 617. N. 7. and the Notes there.

(f) 3dly, He ſhall not have Aid of him in Reverſion. *Co. Lit.* 27. *b.* (f) 11 Co. 80. b. S. P. 11 Co. 84. S. P. but for this vide my firſt Part 292. pl. 5. and the Notes there.

(g) 4thly, Upon his Alienation no Writ of Entry *in conſimili caſu* lies. *Co. Lit.* 27. *b.* (g) 11 Co. 80. b. S. P. 1 Rol. Rep. 179. S. P.

(h) 5thly, After his Death no Writ of (i) Intruſion lies. *Co. Lit.* 27. *b.* (h) 11 Co. 80. b. S. P. 1 Rol. Rep. 179. S. P. (i) But a Formedon lies. 1 Rol. Rep. 179.

(k) 6thly, He may join the Miſe in a Writ of Right in a ſpecial Manner. *Co. Lit.* 27. *b.* (k) 11 Co. 80. b. S. P. 1 Rol. Rep. 179. S. P.

(a) 7thly,

(a) 11 Co. 80. b. S. P. (a) 7thly, In a *Præcipe* brought by him, (b) he ſhall not name himſelf Tenant for Life. *Co. Lit.* 27. *b.*

(b) That he cannot in his Count ſay, that he is ſeiſed for Life. 1 Rol. Rep. 179. S. P.

(c) 11 Co. 80. b. S. P. (c) 8thly, In a *Præcipe* brought againſt him, he ſhall not be named barely Tenant for Life. *Co. Lit.* 27. *b.*

2. Such Tenant hath four Qualities not agreeable with an Eſtate-tail. *Co. Lit.* 27. *b.* 28. *a.*

(d) 11 Co. 80. b. S. P. 1 Rol. Rep. 179. S. P. (d) 1ſt, If he makes a Feoffment, it is a Forfeiture of his Eſtate. *Co. Lit.* 28. *a.*

but for this vide ante 1 Rol. Abr. 851. C. 2. and the Notes there.

(e) 11 Co. 80. b. S. P. 1 Rol. Rep. 179. S. P. (e) 2dly, If an Eſtate in Fee or Tail, in Reverſion or Remainder, deſcend or comes to him, his Eſtate is drowned, and the Fee or Tail executed. *Co. Lit.* 28. *a.*

(f) 11 Co. 80. b. S. P. 1 Rol. Rep. 179. S. P. (f) 3dly, He in Reverſion ſhall be received upon his Default as upon the Default of bare Tenant for Life. *Co. Lit.* 28. *a.*

(g) 11 Co. 80. b. S. P. 1 Rol. Rep. 179. S. P. (g) 4thly, An Exchange between him and a bare Tenant for Life is good, for their Eſtates in Reſpect of the Quantity are equal, and the Difference only in the Quality. *Co. Lit.* 28. *a.*

(h) 11 Co. 83. b. S. P. 3. (h) If Tenant in Tail after Poſſibility, *&c.* grants over his Eſtate, his Grantee ſhall not have theſe Privileges, becauſe the Privity of the Eſtate is altered. *Co. Lit.* 28. *a.* 316. *a.*

Tenant by the Curteſy.

(i) Of what Things.

(i) Of Honors, Offices, &c. Co. Lit. 29. a. b. 1. A Man ſhall not be Tenant by the Curteſy of a bare Right, Title, (k) Uſe, or of a (l) Reverſion or Remainder upon an Eſtate of Freehold, unleſs the particular Eſtate determines during the Coverture. *Co. Lit.* 29. *a.*

(k) 4 Co. 22. a. S. P. ——But I ſuppoſe this muſt be intended before the Statute of 27 H. 8. for it is otherwiſe ſince that Statute. Dyer 9. pl. 255. 2 And. 75. (l) But if a Woman ſeiſed of a Reverſion and Rent marries, hath Iſſue, and dies, the Husband ſhall be Tenant by the Curteſy of this Rent, and the Heir ſhall have the Reverſion, and ſo the Reverſion ſhall be ſevered from the Rent, per Kelw. 104. b. by the Book it does not appear, whether the Reverſion was after a Leaſe for Life or Years, but I ſuppoſe muſt be intended for Life, for otherwiſe he would be Tenant by the Curteſy of the Reverſion and Rent.

(m) 3 Leon. 247. S. P. 2. Nor of Seigniories, Rents, Commons, *&c.* (m) if the Freehold thereof was ſuſpended during the Coverture, otherwiſe if the Suſpenſion was for Years only. *Co. Lit.* 29. *b.*

3. As if the Tenant leaſes for Life to the Seignioreſs, who marries, hath Iſſue, and dies, the Husband ſhall not be Tenant by the Curteſy. *Co. Lit.* 29. *b.*

4. But if the Leaſe was to her for Years, he ſhould be Tenant by the Curteſy. *Co. Lit.* 29. *b.*

(n) For that vide my ſecond Part 654. pl. 8. and the Notes there. 5. Of a Caſtle that ſerves for the publick Defence of the Realm, (n) tho' a Woman ſhall not be endowed thereof. *Co. Lit.* 30. *b.*

(o) For this vide my ſecond Part 654. pl. 5. vide, and the Notes there. 6. Of Common *ſans Number*, (o) tho' a Woman ſhall not be endowed thereof. *Co. Lit.* 30. *b.*

7. Of an Houſe that is *Caput Baroniæ*, (a) tho' a Woman ſhall not be endowed thereof. *Co. Lit.* 30. *b.*

(a) For this vide my ſecond Part 654. pl. 10. and the Notes there.

8. (b) A Man ſhall not be Tenant by the Curteſy of a Copyhold without an (c) expreſs Cuſtom to warrant it. *Mich.* 36 *Eliz.* between *Paulter* and *Cornhill & al'*, *Cro. Eliz.* 361. ruled upon Evidence.

(b) 4 Co. 22. a. S. P. 22. b. S. P. 2 Bulſt. 337.

S. P. per Coke, Moor 597. Hut. 17. (c) Which muſt be ſo laid as to bring his Caſe within it, Sir John Savage's Caſe, 2 Leon. 109, 208. and vide Ever and Aſton, Moor 271. pl. 425. 1 And. 172.

Tenant by the Curteſy.

Of what Eſtate.

1. (d) IF a Woman, Tenant in Tail general marries, and hath Iſſue, and the Iſſue dies, and the Wife dies without other Iſſue; yet her Husband ſhall be Tenant by the Curteſy, for he was intitled before the Eſtate-tail was ſpent, and the Lands remain. *Co. Lit.* 30. *a.*

(d) Pain's Caſe S. P. 8 Co. 34. a. adjudged, 1 Leon. 167. pl. 233. adjudged, 1 And. 184. pl. 220. adjudged, Goulſ. 81, 82. adjudged.

2. So if one ſeiſed in Fee of a Rent, grants it to a Woman in Tail general, who marries, and hath Iſſue, and the Iſſue dies, and the Woman dies without other Iſſue, the Husband ſhall be Tenant by the Curteſy of this Rent, becauſe the Rent remains. *Co. Lit.* 30. *a.*

3. But if a Woman makes a Gift in Tail, reſerving a Rent to her and her Heirs, and marries, and hath Iſſue, and the Donee dies without Iſſue, and the Wife dies, her Husband ſhall not be Tenant by the Curteſy; for this Rent newly reſerved is determined by the Act of God, and no State thereof remains. *Co. Lit.* 30. *a.*

4. (e) If one had married the King's Nief by Licence, and had Iſſue by her, and Lands had after deſcended to her, and ſhe had died, her Husband ſhould have been Tenant by the Curteſy, becauſe by the Marriage the Nief was enfranchiſed during the Coverture. *Co. Lit.* 30. *b.*

(e) Pl. Com. 263. b. S. P.

5. If a Woman marries, and hath Iſſue, and Lands deſcend to her, and the Husband enters, and the Wife is after by Office found an Ideot, the Land ſhall be ſeiſed by the King, and the Title of the Tenancy by the Curteſy beginning at the ſame Inſtant, the Title of the King ſhall be preferred. *Co. Lit.* 30. *b.*

6. If Lands holden of the King by Knight-Service *in Capite* had deſcended to a Woman, and after Office found ſhe had intruded and taken Husband, and had Iſſue, her Husband ſhould have been Tenant by the Curteſy. *Co. Lit.* 30. *b.*

7. If Lands are given to two Women, and the Heirs of their Bodies, and one marries, hath Iſſue, and dies, (f) her Husband ſhall not be Tenant by the Curteſy, for tho' they had ſeveral Inheritances, yet their Eſtate for Life was joint. *Co. Lit.* 183. *a.* contrary to what had been ſaid by ſome. *Co. Lit.* 30. *a.*

(f) But for this vide 2 Rol. Abr. 90. I. 1. and the Notes there.

8. If one deviſes Lands to his Siſter and Heir for her Life, and if ſhe marries and hath Iſſue Male of her Body living at her Death, then to ſuch Iſſue Male, and his Heirs Male for ever; but if ſhe dies leaving no Iſſue Male at her Death, then to *J. S.* and his Heirs, and ſhe marries and hath Iſſue a Son and dies, tho' the Reverſion deſcended to her till the Contingency happened, which could not be during her Life, ſo that ſhe had a Fee, yet her Husband ſhall not be Tenant by the Curteſy, becauſe upon her Death, when his Eſtate ſhould be conſummated, the Remainder veſted in the Son. *Trin.* 11 *Georg.* 1. between *Vernon* and *Boothby*,

Boothby, 2 *Mod. Caſes* 147. *per Curiam*, and the Opinion of the Judges certified accordingly.

Tenant by the Curteſy.

Of what Seiſin.

1. IF Lands in Fee-ſimple or Tail deſcend to a Woman, who marries, hath Iſſue, and dies before any Entry, her Husband ſhall not be Tenant by the Curteſy, tho' ſhe had a Seiſin in Law; otherwiſe if ſhe or her Husband had (a) entered during her Life. *Co. Lit.* 29. *a.*

(a) By which ſhe would have had an actual Seiſin. Co. Lit. 40. a. 1 Co. 97. b. 6 Co. 68. a. 8 Co. 36. a.

(b) Co. Lit. 15. b. Kelw. 104. b. 1 Co. 97. b. 98. a. 2 Sid. 110, 117, 118.

2. But in Caſe of a Deſcent of an Advowſon, or (b) Rent, though the Wife dies before the Rent becomes due, or the Church becomes void, and ſhe had but a Seiſin in Law, yet he ſhall be Tenant by the Curteſy, becauſe he could by no Induſtry attain to any other Seiſin. *Co. Lit.* 29. *a.*

3. If a Woman Tenant in Tail general makes a Feoffment in Fee, and takes back an Eſtate in Fee, marries, hath Iſſue and dies; her Husband ſhall not be Tenant by the Curteſy, but the Iſſue may recover againſt him in a *Formedon*. *Co. Lit.* 29. *b.*

4. A Rent-Charge was granted to a Woman and her Heirs, payable at two Days, the firſt of the ſaid Payments to begin at ſuch of the ſaid Days as ſhould next happen after the Death of *C.* and the Woman died before *C.* and whether her Husband ſhould be Tenant by the Curteſy thereof. *Mich* 1658. between *Dethick* and *Bradburn*, 2 *Sid.* 110, 117. debated, but no Judgment.

Tenant by the Curteſy.

What ſufficient (c) Iſſue to make him ſo.

(c) A Monſter that hath not human Shape is not ſo. Co. Lit. 29. b. 8 Co. 33. a.

1. IF a Woman, Tenant in Tail Male, takes Husband, and they have Iſſue a Daughter, and dies, he ſhall not be Tenant by the Curteſy, becauſe this Iſſue (d) could by no Poſſibility inherit this Eſtate. *Co. Lit.* 29. *b.*

—— But one Born deaf and dumb, or an Ideot, is ſo. Co. Lit. 29. b. 8 Co. 33. a. (d) That he ſhall be Tenant by the Curteſy only, where his Iſſue might poſſibly have inherited the Mother's Eſtate. 8 Co. 32. b. and vide 2 Inſt. 356.

(e) 8 Co. 33. b. S. P.

2. (e) But if one hath Iſſue by his Wife, either before or after the Eſtate comes to her, tho' ſuch Iſſue be dead, it is ſufficient to intitle the Husband to be Tenant by the Curteſy. *Co. Lit.* 29. *b.* 30. *a.*

(f) 8 Co. 33. a. S. P.

3. (f) If a Woman dies in travail, and the Child is ripped out of her Body alive, yet her Husband ſhall not be Tenant by the Curteſy, becauſe not born during the Marriage. *Co. Lit.* 29. *b.*

(g) Dyer 25. pl. 159. S. P. N. Bendl. 21. pl. 35. S. P. 1 And. 35. pl. 88. S. P. 8 Co. 33. a. S. P.

4. (g) If the Iſſue is born alive, tho' it never cries, it is ſufficient, for the Crying is but a Proof of its being born alive, and ſo is Motion, Stirring, *&c. Co. Lit.* 29. *b.*

5. By the Cuſtom of Gavelkind a Man may be Tenant by the Curteſy without having Iſſue. *Co. Lit.* 30. *a.* 111. *a.*

Tenancy by the Curteſy.

When it ſhall be ſaid to commence.

1. THO' the Eſtate be not conſummate till the Death of the Wife, yet after Iſſue had, it hath ſuch a Beginning in the Life of the Wife, (a) as is reſpected in Law for divers Purpoſes. *Co. Lit.* 30. *a.*

(a) Where he cannot waive the Eſtate of Tenancy by the Curteſy, and claim by Deviſe, becauſe the Freehold commenced in him before the Eſtate for Life. Co. Lit. 30. a. Godb. 15.

2. After Iſſue had the Husband (b) ſhall do Homage alone, and is become Tenant to the Lord, and the Avowry ſhall be made upon him only in the Life of the Wife. *Co. Lit.* 30. *a.*

(b) Or receive it. Co. Lit. 170.

3. If after Iſſue had, the Husband, in the Life of the Wife, makes a Feoffment in Fee, and the Wife dies, the Feoffee ſhall hold, during the Life of the Husband, againſt the Heir of the Wife, for being an Eſtate of Tenancy by the Curteſy initiate and not conſummate, it is no Forfeiture. *Co. Lit.* 30. *a.*

4. If after Iſſue had the Wife is attainted of Felony, yet her Husband ſhall be Tenant by the Curteſy, tho' it would be otherwiſe if attainted before Iſſue had. *Co. Lit.* 40. *a.*

5. If after Iſſue had, her Villein purchaſes Lands, her Husband ſhall have them in his own Right. *Co. Lit.* 124. *b.*

Leaſes by Eccleſiaſtical Perſons by the Common Law.

1. (c) BEfore the reſtraining Statutes, Biſhops, with the Confirmation of the Dean and Chapter, Maſters and Fellows of Colleges, Deans and Chapters, Maſters or Guardians of any Hoſpital, and their Brethren, Parſons or Vicars, with the Conſent of the Patron and Ordinary, Archdeacons, Prebends, or other Bodies Politick, Spiritual and Eccleſiaſtical (d) (*concurrentibus his quæ in jure requiruntur*), might have made Eſtates in Fee-ſimple, Tail, for Lives, or Years, without Limitation or Stint. *Co. Lit.* 44. *a.*

(c) 10 Co. 60. a. Bridg. 29. Ley 78. Moor 108.

(d) Diverſity between ſole Corporations, and thoſe aggregate of many, as to leaſing without Aſſent of others. Co. Lit. 300. b.

Leaſes by Biſhops, Tenants in Tail, and Husbands and Wives, by 32 Hen. 8. cap. 28.

1. BY (e) 32 *Hen.* 8. *cap.* 28. it is enacted, that all Leaſes thereafter to be made of any (f) Manors, Lands, Tenements and Hereditaments by Writing indented under (g) Seal, for Years or Life, by any having any Eſtate of Inheritance in Fee-ſimple, or (h) Tail, in their own, or in

(e) This is called the enabling Statute. Co. Lit. 44. a.

(f) That ſuch Leaſe muſt be of Corporeal Things neceſſary to be let, and out of which a Rent may be reſerved, and not of Things that lie in Grant, as Advowſons, Fairs, &c. out of which a Rent cannot be reſerved. Co. Lit. 44. b. Talentine and Denton, Cro. Jac. 111, 112. Moor 778. pl. 1078. —— Not de prima veſtura. Palm. 175. (g) So that Tenant in Tail of a Copyhold cannot leaſe by this Statute, for he cannot grant by Deed without the Licence of the Lord, and the Lands in their own Nature are only demiſeable by Copy. Cro. Car. 44. (h) So that where Lands are given to Husband and Wife, and the Heirs of their two Bodies, and the Husband dies leaving Iſſue by his Wife, ſhe may leaſe within this Statute, tho' the Iſſue doth not claim as Heir of her Body only, but of both. Godb. 102. —— But if given to Husband and Wife, and the Heirs of the Body of the Survivor, they cannot Leaſe by this Statute, becauſe the Tail is not veſted. 10 Co. 51. a.

the

the Right of (a) their Churches or Wives, or jointly with their Wives, of any Eſtate of Inheritance, ſhall be good in Law againſt their Leſſors, their (b) Wives, Heirs, and (c) Succeſſors, as if ſeiſed in Fee-ſimple thereof to their own Uſe.

(a) A Biſhop ſeiſed jure Epiſcopatus, a Dean of his ſole Poſſeſſions jure Decanatus, an Archdeacon jure Archidiaconatus, Prebend, and the like, are within the Act, for every of them are ſeiſed jure Eccleſiæ. Co. Lit. 44. b. —— A Prebendary that is ſeiſed in the Right of his Prebend, is within the Equity of this Act. Acton and Pitcher, 4 Leon. 51. adjudged per totam Curiam. Watkinſon and Man, Cro. Eliz. 350. adjudged, and Fenner ſaid, it had been ſo adjudged in the Caſe of a Treaſurer of a Church, and vide Palm. 106. —— So a Chancellor of a Cathedral Church is within this Act, for he is a Prebendary and hath a Prebend, and more than this, a Dignity, and is ſeiſed in Fee in Right of the Church. Biſcoe and Holt, 1 Lev. 112. adjudged, 1 Sid. 158. adjudged, 1 Keb. 576. —— Whether a Precentor or Chantor of St. Paul's be within the Act, vide Palm. 104. 1 Lev. 113. (b) But ſuch Leaſe will not bind him in Reverſion or Remainder. 8 Co. 34. a. Co. Lit. 44. a. Noy 6. Godb. 9. the Eſtate-tail out of which derived being determined. 1 Leon. 268. cont. Dyer 48. pl. 6. (c) Tho' not confirmed by Dean and Chapter. Co. Lit. 44. a.

2. Provided this Act ſhall not extend to any Leaſes of any Manors, &c. in the Hands of any Farmer, by Virtue of any old Leaſe, unleſs (d) ſurrendered or ended (e) within one Year after making the ſaid new Leaſe; nor to any Grant of any Reverſion of any Manors, &c. nor to any Leaſe of any Manors, &c. which have not (f) (g) moſt commonly been (h) let to farm by the Space of twenty Years next before ſuch Leaſe thereof made, nor to any Leaſe to be made (i) without Impeachment of Waſte, nor to any Leaſe to be made for (k) above twenty-one Years, or (l) three (m) Lives at moſt, from the (n) Day of the making thereof, and that

(d) A conditional Surrender not ſufficient within this Act, for the Intent was, that it ſhould be abſolute, and not illuſory. 5 Co. 2. b. Co. Lit. 44. b. Hob. 204. (e) So that if a Biſhop leaſes for twenty-one Years from the Making, there being then a Leaſe in Being not expired by four Years, it is not a good Leaſe within this Act; yet if it be confirmed by the Dean and Chapter, it will bind his Succeſſor, not being reſtrained by the Statute of 1 Eliz. Co. Lit. 45. a. 4 Leon. 78. adjudged, Fox and Collier, Moor 107. pl. 251. 1 And. 65. 140. and vid. Palm. 466. Latch 242. Moor 66. pl. 180. March 43. (f) If let for eleven Years, at one or ſeveral Times within the twenty Years, it is ſufficient. per Co. Lit. 44. b. but 1 Sid. 416. it is ſaid by Kelynge Ch. Juſt. and Twiſden, that this Collection of my Lord Coke is falſe, and not warranted by the Statute, becauſe the firſt Part of the Statute, as to leaſing, ſeems to refer to a more antient Time, and ſo muſt the laſt Part as to the Occupying by Farmers for twenty Years, but vide Cro. El. 708. Raym. 167. —— But where Lands had been antiently let, and after kept for more than twenty Years in the Biſhop's Hands, yet it ſeems they may be after let by this Act, for that it was never the Intent to tie Biſhops ſtrictly to the Words of the Act, but to preſerve the antient Rent. Pemble and Stern, 1 Lev. 212. debated, and two Judges againſt Two. 1 Sid. 316, 416. debated, and the Court divided. Raym. 165, 166, &c. the Court divided, 2 Keb. 213, &c. and vide Vaugh. 34. 2 Jon. 37. —— But that Lands but once let cannot be ſaid uſually let, for uſus eſt ex iteratis actibus, vide 2 Rol. Abr. 262. pl. 13. vide, and the Notes there. (g) Where a Prebend had been uſually let, with an Exception of all Crab-Trees, and ſuch like Trees, at the Rent of 17 l. yearly, it cannot by this Act be let without that Exception, for by that not only the Profits but the Soil is excepted, ſo that if let without, more would be let than uſual, and this not the antient Rent. Smith and Bole, Cro. Jac. 458. adjudged, 3 Bulſt. 290. adjudged not good by 13 El tho' confirmed. Palm. 106. cited. (h) A Grant by Copy of Court-Roll in Fee for Life or Years, is a Letting within this Act, tho' but at Will, according to the Cuſtom, and ſo it is of a Leaſe at Will at Common Law; but theſe Lettings muſt be by one ſeiſed of an Eſtate of Inheritance, and not by Guardian in Chivalry, Tenant by the Curteſy, Tenant in Dower, or the like. Co. Lit. 44. b. Dyer 271. pl. 28. 6 Co. 37. Moor 759. pl. 1050. Cro. Jac. 76. and vide poſt Notes on Stat. 13 El. —— And the Rent payable for ſuch Copyhold taken as the accuſtomed Rent. Moor 759. —— Leaſing while Temporalties in the Hands of the King, not ſufficient within this Act, becauſe the King had no Inheritance. Palm. 176. (i) So that a Leaſe for Life, Remainder for Life, &c. is not warranted by this Act, becauſe diſpuniſhable of Waſte. Co. Lit. 44. b. 6 Co. 37. a. —— But a Leaſe to one during three Lives, is good within the Act, becauſe the Occupant, if any, will be puniſhable for Waſte. Co. Lit. 44. b. 6 Co. 37. a. (k) But it may be for a leſſer Term, or fewer Lives. Co. Lit. 44. b. Dyer 246. pl. 69. 5 Co. 6. a. 1 Leon. 148. —— So that a Leaſe for twenty Years, to begin at Michaelmas next, is warranted by the Statute, not being above twenty-one Years from the Day of the Making. 1 Leon. 147, 148. (l) If a Biſhop leaſes for three Lives, and one dies in the Life of the Biſhop, yet it is not a good Leaſe againſt his Succeſſor. 10 Co. 62. a. (m) If a Biſhop makes a Leaſe for three Lives to A. and A. leaſes to another for 100 Years, if three others live ſo long, and it is confirmed by Dean and Chapter, it is not good. Ley 74. (n) That it may begin from the Making. Co. Lit. 44. a. —— If made for three Lives a die datus, it is good within the Statute, if Livery be made after the Date; but for this vide ante 1 Rol. Abr. 828. pl. 4. and the Notes there.

upon ſuch Leaſe there be reſerved (a) yearly, during the ſame Leaſe, payable to the Leſſors, their (b) Heirs and (c) Succeſſors, to whom the ſaid Lands ſhould have come after the Death of the Leſſors, if no ſuch Leaſe had been made, and to whom the Reverſion thereof ſhall appertain, according to their Eſtates and Intereſts, ſo much (d) yearly Rent, or (e) more, as hath been (f) accuſtomably paid, for the Manors, &c. ſo to be let within twenty Years next before ſuch Leaſe thereof made; and that ſuch Perſon to whom the Reverſion of ſuch Manors, &c. after the Death of ſuch Leſſors or their Heirs, ſhall have ſuch like Remedy and Advantage againſt the Leſſees, their Executors and Aſſigns, as the Leſſor ſhould and might have had againſt the Leſſee; ſo that if the Leſſor was ſeiſed of an eſpecial Eſtate-tail, the Iſſue or Heir of ſuch Leſſor ſhall have the Reverſion, Rents and Services reſerved on ſuch Leaſe after the Death of the Leſſor, as the Leſſor might or ought if he had lived.

(a) So that tho' the accuſtomed Rent was payable at four Days, yet it is ſufficient within this Act, if made payable at one. Co. Lit. 44. b. 4 Leon. 78. ſaid to be within the Words, but not the Equity of the Act. Vide poſt the Notes on Stat. 13 El. c. 10. —— But 5 Co. 5. b. upon a ſperial Act of Parliament, where this Word yearly was wanting, it was held otherwiſe. (b) Where the Husband of one Coparcener in Tail deceaſed, being Tenant by the Curteſy, joined with the other in a Leaſe, reſerving the Rent to them and their Heirs; and it was held not to be a good Leaſe within this Act. Latch 45. —— Tenant in Tail Male having two Sons by ſeveral Venters dies, the Eldeſt leaſes for twenty-one Years, reſerving the Rent generally to him, his Heirs and Aſſigns, and after died without Iſſue Male, leaving two Siſters, his Heirs; yet this Rent ſhall go with the Reverſion to the ſecond Son, for the Words muſt be intended ſecundum ſubjectam materiam, and the younger Brother is Heir to the Intail, and therefore the Leaſe good within the Statute. Hard. 89, &c. adjudged in the Exchequer, the Barons delivering their Opinions ſeverally; and by ſome of their Arguments it ſeems as if the Reſervation had been during the Term, tho' not ſo expreſſed in the Caſe, and vide Dyer 115. pl. 66. (c) A Biſhop on ſuch Leaſe, reſerved the Rent to him and his Succeſſors, provided that during the Vacancy of the See it ſhould be paid to the Chapter, according to the Rate of the Time of the Vacancy; and it was held the Proviſo was void, the Chapter not being capable of Taking, but the Leaſe good. Dyer 221. 1 And. 9. Moor 51. pl. 152. Dal. 54. 4 Leon. 71. (d) If the yearly Rent be reſerved, it is ſufficient, by the expreſs Words of this Act, tho' Heriots and other caſual Profits uſually reſerved be not. Co. Lit. 44. b. Moor 759. pl. 1050. adjudged, vide poſt the Notes on the Statute 13 El. cap. 10. (e) Tho' more may be reſerved, yet if a Leaſe be made of twenty Acres uſually let, and one Acre not uſually let, reſerving the accuſtomable yearly Rent, and ſo much more as exceeds the Value of the other Acre; this is not warranted by the Act, for Part was not before uſually let, and the Rent iſſuing out of the Whole is not the accuſtomable Rent. Co. Lit. 44. b. 5 Co. 5. b. upon a Special Act of Parliament, and vid. Cro. Car. 50. —— So if two Farms uſually let ſeverally, under two ſeveral Rents, are joined in one Leaſe, and one intire Rent reſerved for the Whole, it is not good. Co. Lit. 44. b. 5 Co. 5. b. 6. a. on a private Act, and vide Cro. Car. 23. —— But if Tenant in Tail lets Part of the Land uſually demiſed together, reſerving a Rent, pro rata, or more, it is good within this Statute, for in Subſtance this is the accuſtomable Rent. Co. Lit. 44. b. —— But 5 Co. 5. b. upon a Private Act of Parliament it was held otherwiſe. Vide 2 Mod. 57. —— But where Part was let, and the Whole antient Rent reſerved for that Part only, it was held a good Leaſe within the Act, by Three Judges againſt Two. Thredneedle and Lynham, 1 Mod. 203. 2 Mod. 57. 3 Keb. 192, &c. —— But where Part was let, reſerving the accuſtomed Rent, without ſaying what, it was held the Leaſe was not good. Owen and Apprees, Cro. Jac. 94. Hetl. 22, &c. —— Where two Parceners in Tail of twenty Acres of equal Value, upon a Partition have ten Acres allotted to each, they may leaſe their ſeveral Parts, reſerving half the accuſtomable Rent. Co. Lit. 44. b. (f) That it muſt be intended the laſt reſerved, for what is altered cannot be ſaid the accuſtomed. Hard. 326. per Hale.

Provided the Wife be made Party to every Leaſe made by her Huſband of any Manors, &c. being the Inheritance (g) of the Wife, and that ſuch Leaſe be by Indenture in the Name of the Husband and Wife, and ſhe ſeal the ſame, and that the Rent be reſerved to the Husband and Wife, and the Heirs of the Wife, according to her Eſtate of Inheritance in the ſame, and that the Husband ſhall not alien, diſcharge, &c. the Rent reſerved, or any Part thereof, longer than during the Coverture, unleſs by Fine levied by the Husband and Wife; but the Rent ſhall remain, deſcend, or come after the Death of ſuch Husband to ſuch Perſons, and their Heirs, as the Lands ſo leaſed would have done, if no Leaſe thereof had been made.

(g) But if the Inheritance of both, ſhe need not be made Party, for the Proviſo directing the Rent to be reſerved to the Heir of the Wife, muſt be intended where ſhe hath the ſole Inheritance. Cro. Car. 22. by three Judges; but Hobart doubted.

Provided this Act extends not to give any Liberty to any (a) Parſon or Vicar, to leaſe or grant any their Meſſuages, &c. belonging to their Churches or Vicarages, otherwiſe than they might have done before this Act.

(a) But a Prebend, &c. not being excepted, may leaſe by this Act. Cro. El. 350. vide ſupra. —— But a Leaſe by Parſon or Vicar for three Lives, &c. not reſtrained by 13 Eliz. muſt be confirmed by his Patron and Ordinary, or elſe it will not bind his Succeſſor. Co. Lit. 44. b.

Leaſes reſtrained by (b) 1 Eliz. cap. 19.

AND be it further enacted by the Authority aforeſaid, that all (c) Gifts, Grants, Feoffments, Fines, and other Conveyances and Eſtates, from the firſt Day of this preſent Parliament, to be had, made, done or ſuffered by any Archbiſhop or Biſhop, of any Manors, Lands, Tenements, or other Hereditaments, being (d) Part (e) of the Poſſeſſions of his Archbiſhoprick or Biſhoprick, or united (f) (g) appertaining or belonging to any the ſaid Archbiſhopricks or Biſhopricks, to any Perſon or Perſons, Bodies Politick or Incorporate (h) (other than the Queen's Highneſs, her Heirs and Succeſſors) (i) whereby any Eſtate or Eſtates

(b) This is a Private Act, of which the Court, without Pleading it, will not take Notice. Poſt 2 Rol. Abr. 466. pl. 6. and the Notes there. — This Act is not printed in the Statutes at Large, but in the Abridgment only; I have therefore inſerted this Clauſe verbatim, as taken from Moor 107. —— This Act and the 13 Eliz. are called the diſabling Acts. Co. Lit. 44. a. b. —— But neither of theſe diſabling Acts, nor any other, do in any Sort alter or change the inabling Act of 32 H. 8. but leave it for a Pattern in many Things, for Leaſes to be made by others. Co. Lit 44. b. —— Tho' this Act of 13 Eliz. do not appoint the Leaſe to be in Writing, yet it muſt therein and in the other eight Properties and Qualities required by 32 H. 8. follow the Pattern thereof. Co. Lit. 45. a. 6 Co. 37. a. b. Hard. 126. 1 Vent. 246. —— In not being made diſpuniſhable of Waſte. Co. Lit. 45. a. 6 Co. 37. a. b. (c) So if a Writ of Annuity be brought againſt a Biſhop upon a feigned Preſcription, and he ſuffers Judgment to go againſt him on a Verdict, or by Confeſſion, it is within the Act; for otherwiſe his Succeſſor would be charged with the Arrears; for tho' it does not iſſue out of the Biſhoprick, yet the Charge is in Reſpect thereof. 10 Co. 61. a. Bridg. 30. (d) That an Advowſon is ſo, and that or the next Avoidance cannot be granted by a Biſhop ſo as to bind his Succeſſor, tho' confirmed by Dean and Chapter. Sale and the Biſhop of Coventry. 1 And. 241. pl. 257. Cro. El. 207. Cro. El. 440, 690. 10 Co. 60. b. 1 Mod. 204. 2 Mod. 56. (e) He cannot grant a Rent-Charge out of his Poſſeſſions, tho' no Part thereof. 10 Co. 61. b. (f) But yet they may make Grants of antient Offices of Neceſſity with antient Fees, for ſuch Grants are not reſtrained by 1 or 13 Eliz. being no Diminution of the Revenue, but not being within 32 Hen. 8. they muſt be confirmed by the Dean and Chapter. Co. Lit. 44. a. 10 Co. 61. a. Bridg. 30. Cro. Car. 49. —— But cannot grant a new Fee. 1 Brownl. 182. —— But where antiently payable yearly, it may be made payable half-yearly. Cro. Car. 16, 17. —— But where antient Fee was a Robe or 13 s. 4 d. a Grant of the Office with a Robe, and not in the Diſjunctive is as to the Fee void. Cro. Car. 280. —— But where ſuch Office hath been antiently granted to one, he cannot grant it to Two, for that is not neceſſary. 10 Co. 61. a. Bridg. 31. 3 Leon. 31. Walker and Sir John Lamb. Cro. Car. 258, 259. 1 Jon. 264. —— But having been granted to Two ſince the Statute, it is an Evidence that it was ſo granted before. 4 Mod. 17, 27. —— Where granted to one for Life, it cannot be granted to another in Reverſion, for that ſuch Grant is not neceſſary. 10 Co. 61. b. Bridg. 31. Walker and Sir John Lamb, Cro. Car. 258, 259. 1 Jon. 264. —— But where an antient Office is granted with a new or additional Fee, whether it ſhall be void for the Whole, or good for the Office, and void as to the Fee. Cro. Car. 50, 280. 2 Brownl. 137. Bridg. 32. —— Tho' Biſhoprick founded of late Time, yet the Biſhop may grant neceſſary Offices in Poſſeſſion with a reaſonable Fee. 10 Co. 61. b. Bridg. 31. Cro. Car. 48. 3 Keb. 472, 506. —— Such as were granted before the 1 Eliz. Ridly and Pownell, 2 Lev. 136. 3 Keb. 47. —— That a Biſhop may grant a new Office with a reaſonable Fee. Vide Cro. Car. 38. (g) Where a Biſhop granted the Office of Keeper of a Park, with the antient Fee of five Marks, and a Livery yearly, una cum paſtura pro duobus equis in eodem parco, and it was confirmed by Dean and Chapter; it was held the Grant as to the Office and antient Fee would bind the Succeſſor, but was void as to the Paſture. The Biſhop of Chicheſter and Freeland, Bridg. 29, &c. per Bridgman. Ley 71, &c. with the Arguments of the ſeveral Judges, the Court being divided. Cro. Car. 47, 48, &c. (h) If not excepted, ſhe would have been within the general Reſtraint. 5 Co. 14. a. —— And whereas to evade this Act ſeveral Eſtates had been granted to Queen Elizabeth, to the End ſhe might grant them over to others; by the 1 Jac. cap. 3. reciting this Miſchief, Archbiſhops and Biſhops were reſtrained from making any Grants to the King, and vide Co. Lit. 44. a. 10 Co. 62. (i) Where a Parſon 12 Eliz. leaſed Part of his Glebe for fifty Years, and the Biſhop being Patron, and Dean and Chapter confirmed it; and it was held good notwithſtanding this Statute, for this was no Part of the Poſſeſſions of the Biſhop, and by the Confirmation no Eſtate paſſed. Cro. El. 430. —— Otherwiſe if a Biſhop being diſſeiſed of Part of his Poſſeſſions confirms the Eſtate of the Diſſeiſor. Cro. El. 430.

ſhall or may paſs from the ſaid Archbiſhop or Biſhop (other than (a) for the Term of (b) twenty-one Years, (c) or three Lives, from ſuch Time as any ſuch Leaſe, Grant or Aſſurance (d) ſhall (e) begin, and whereupon the old (f) (g) accuſtomed yearly (h) Rent, or more, ſhall be (i) reſerved, and payable yearly during the ſaid Term of twenty-one Years, or three Lives) ſhall be utterly void and of (k) none Effect, to all Intents, Conſtructions and Purpoſes; any Law, Cuſtom, or Uſage to the contrary in any wiſe notwithſtanding.

(a) Yet thoſe, if not warranted by 32 H. 8. will not bind his Succeſſors, unleſs confirmed by the Dean and Chapter. Co. Lit. 44. b. — As in Caſes of concurrent Leaſes. Co. Lit. 45. a. (b) Tho' the Statute does not ſay, or under, yet Leaſes for a leſs Time are good. 6 Co. 6. b. (c) Being in the Disjunctive he cannot make both, as if there be a Leaſe for more than one Year in Being, he cannot make a Leaſe for three Lives. Elmer's Caſe, 5 Co. 2. a. Moor 253. pl. 460. debated, but Judgment given on another Point; but between Marler and Wright it was ſo adjudged. Cro. El. 141. 1 And. 193. pl. 228. for during the Leaſe for Years the Succeſſor could have no Remedy for the Rent reſerved on the Leaſe for Lives, either by Diſtreſs, Debt or Aſſiſe. 2 Brownl. 164. cited, and vide Co. Lit. 45. a. 1 Leon. 59. Palm. 466, 468. Latch 241, 242. — Yet in ſuch Caſe he may leaſe for twenty-one Years, and ſuch concurrent Leaſe being confirmed by Dean and Chapter will bind the Succeſſor; but for this vide the Notes upon the Statute 32 Hen. 8. ante. (d) By Co. Lit. 45. a. from the Making; but according to Moor 66. pl. 180. it ſeems it may begin from the End of a former Leaſe then in Being. (e) If a Biſhop ſuffers an Uſurpation, tho' it will bind him, it will not his Succeſſor. Dalton and Biſhop of Ely, Cro. Jac. 673. 1 Jon. 45, 46, &c. (f) Where the antient Rent was made payable on the Land, and the new Rent at a diſtant Place, tho' this may be good within the Words, yet it is not within the Intent of the Act. 4 Leon. 78. (g) And therefore ſuch Leaſe, tho' confirmed by Dean and Chapter, if not of Land uſually let, cannot be good, for otherwiſe there can be no accuſtomed Rent. Cro. El. 874. (h) Where his Covenants, as to pay Taxes, unleſs uſual in former Leaſes, ſhall not bind his Succeſſor. Davenant and the Biſhop of Sarum, 2 Lev. 68. 1 Vent. 223. 3 Keb. 69. (i) But a Fair, Tithes, &c. not mainorable, out of which no Rent can be reſerved, cannot by a Biſhop be leaſed for three Lives, rendring the old Rent, becauſe there is no Remedy for it, either by Diſtreſs, Debt, or Aſſiſe. 5 Co. 3. adjudged, Talentine and Denton, Cro. Jac. 111, 112. adjudged, Moor 778. pl. 1078. adjudged, Richman and Garth, Cro. Jac. 173. adjudged, and vide 2 Rol. Abr. 446. pl. 5. and the Notes there. — So a Biſhop cannot leaſe a Fair, &c. for twenty-one Years, reſerving the accuſtomed Rent; for tho' the Reſervation is good by Way of Contract between the Leſſor and Leſſee, yet the Rent is not incident to the Reverſion, nor ſhall go with it, per 5 Co. 3. but in the Caſe of Talentine and Denton, upon a Leaſe of Tithes, it was held otherwiſe. Cro. Jac. 112. Moor 778. 2 Saund. 304. cited, Raym. 195. cited, and vide Ley 76. Palm. 105. Hard. 326. — But a Leaſe for three Lives of Lands and Tithes uſually let together, is good. Vaugh. 203. and vide Lit Rep. 305. (k) Yet it ſhall bind the Biſhop that makes it. Co. Lit. 45. a. 10 Co. 60. b. 1 And. 241, 244. Biſhop of Coventry and Litchfield, Cro. El. 207. 1 Leon. 307. cited, Armiger and Biſhop of Norwich, Cro. El. 690. and vide 3 Co. 59. Bridg. 30. Hard. 156, 326. Cro. Jac. 173. Savil 119. — But if the Succeſſor accepts the Rent, it ſhall bind him for his Time. Owen and Apres, Cro. Car. 94, 95. Hetl. 22, &c. — Otherwiſe if the Leaſe be meerly void, as if a Biſhop leaſes Tithes for three Lives, and his Succeſſor accepts the Rent. Cro. Jac. 173.

Leaſes reſtrained by (l) 13 Eliz. cap. 10.

BY (m) 13 *Eliz. cap.* 10. it is enacted, that from (n) henceforth all Leaſes, Gifts, Grants, Feoffments, Conveyances, or (o) Eſtates to be made, had, done, or ſuffered by any (p) Maſter, and Fellows of any College, Dean and (q) Chapter of any Cathedral or Collegiate Church,

(l) This is a Publick Act, of which the Judges ought to take Notice. 1 Rol. Abr. 465. pl. 3. vide, and the Notes there. (m) Tho' in this Act there are no Words to reſtrain Leaſes from being without Impeachment of Waſte, as in 32 H. 8. yet ſuch Leaſes are againſt the Intention and Equity of this Act, being made againſt unreaſonable Leaſes, as appears by the Preamble; and therefore if ſuch Leaſe be made to one for Life, Remainder for Life, Remainder for Life, it is not good by this Act, becauſe diſpuniſhable of Waſte. 6 Co. 37. a. b. Owen and Aprees, Cro. Car. 94, 95. Hetl. 20, 24. — That Leaſes not reſtrained by this Act ought to follow the Pattern of 32 H. 8. vide ante the Notes on Stat. 1 Eliz. (n) That a Leaſe for forty Years made before this Act, might be after confirmed by the Patron and Ordinary. Atkinſon and Dennis, Moor 459. pl. 636. Cro. El. 430. Cro. El. 18. 5 Co. 15. a. Cro. Jac. 52. (o) This Act is taken beneficially, to avoid all Inventions to evade it; and therefore where a Writ of Annuity was brought againſt a Parſon upon a feign'd Preſcription, and he prays in Aid of the Patron and Ordinary, and afterwards a Verdict is given againſt him, but all was feign'd, &c. tho' this charges the Parſon and not his Poſſeſſions, yet it is within the Act. 5 Co. 14. b. — So if a Fine with Proclamations be levied by Strangers, it will not bar. 11 Co. 78. b. but for this vide under Title Fines. (p) Tho' incorporated by any other Name, as Provoſt and Fellows, &c. yet it is within this Act. 11 Co. 76. a. (q) A Chapter that hath no Dean or Head reſtrained from leaſing by this Act. 1 Mod. 104. 2 Mod. 56.

Maſter,

Maſter or Guardian of any Hoſpital, Parſon or Vicar, or (a) any other having any Spiritual or Eccleſiaſtical Living, or any Houſes, Lands, Tithes, Tenements, or other Hereditaments, being (b) (c) Parcel of the Poſſeſſions of any ſuch College, Cathedral Church, Chapter, Hoſpital, Parſonage, Vicarage, or other Spiritual Promotion, or any Way belonging to the ſame, to (d) any Perſon or Perſons, Bodies Politick or Corporate, (e) other than for (f) twenty-one Years, or three Lives, (g) from the Time ſuch Leaſe or Grant ſhall be made, whereupon the (h) accuſtomed (i) yearly (k) Rent, or more, ſhall be (l) reſerved yearly during the Term, ſhall be (m) utterly void, and of no Effect.

(a) These general Words extend not to Biſhops, for Beginning with Deans and Chapters, they muſt be intended of others inferior to thoſe before named.

2 Co. 46. Goulſ. 171. 1 Rol. Rep. 151. 1 Mod. 204. (b) By the Equity of this Act they cannot grant a Rent-Charge out of their Poſſeſſions, tho' that is no Part thereof. 5 Co. 15. a. 1 Rol. Rep. 171. (c) As to their Grants of antient Offices, vide the Notes on Stat. 1 Eliz. for they are on the ſame Foot. —— A Dean having a Peculiar made a Commiſſary, which was confirmed by Dean and Chapter, and yet ſeems would not bind his Succeſſor, ſuch Grant being in Nature of a Commiſſion, and what he did as a Subſtitute, and in the Name of the Principal, who muſt anſwer for his Acts and Offences; and it would be hard to bind the Succeſſor ſo to do, if he could not remove him. Noy 153. (d) Not even to the King, for he is bound by Statutes made to prevent the Impoveriſhing the Church, &c. 5 Co. 14. a. b. 11 Co. 75. b. 1 Rol. Rep. 151. —— But that the Law was once taken to be otherways, vide my firſt Part 759. pl. 2. (e) Yet thoſe to bind the Succeſſors muſt be confirmed by others that have an Intereſt, if not warranted by 32 H. 8. Co. Lit. 44. b. —— Concurrent Leaſes, or Leaſes in Reverſion, are not reſtrained by this Act. Co. Lit. 45. a. Hob. 269. —— But vide 18 Eliz. cap. 11. by which the old Leaſe muſt be ſurrendered or ended within three Years after making the new Leaſe. (f) Tho' not ſaid, or under, yet Leaſe for leſs Time is good. 5 Co. 6. b. 1 Leon. 306. (g) From the Making. Co. Lit. 45. a. —— Yet where a Dean and Chapter leaſed for three Lives, rendring the accuſtomed Rent, and there being a Letter of Attorney to make Livery, it was not made till three of the Rent Days were paſt, and yet held good. Walter and the Dean and Chapter of Norwich, Moor 875. pl. 1223. Owen 136. (h) Lands uſually granted by Copy, rendring Rent, may be ſaid to be uſually let, and the Rent reſerved the accuſtomed Rent within this Statute. 6 Co. 37. b. Cro. Jac. 76. but for this vide the Notes ante upon the Statute 32 H. 8. (i) So the Rent may be reſerved at one Day, tho' it uſed to be reſerved at Two or more. 6 Co. 38. a. and ſaid this differed from Montjoy's Caſe, in which Private Act the Word yearly was wanting, vide ante the Notes on the Stat. 32 H. 8. —— Where the Rent was reſerved at the uſual Feaſts, or twenty Days after, and good, being for the Benefit of the Succeſſor. 2 Lev. 62. 1 Vent. 245, 246. (k) Which is ſufficient, tho' an Heriot be not reſerved as uſual. 6 Co. 38. a. Cro. Jac. 76. vide ante Notes on the Stat. 32 H. 8. (l) Where the old Rent reſerved was 40 l. and a couple of Capons yearly, and a Leaſe was made to Husband and Wife, reſerving 40 l. yearly, and he covenanted to pay a couple of Capons yearly; this was held not a good Leaſe, for in the former Leaſes the Capons had been uſually reſerved, and ſo Part of the Rent; but here the Husband only covenanted to pay them, which would not bind the Wife if ſhe ſurvived, and his Covenant amounted not to a Reſervation, tho' it would have been otherwiſe if both had covenanted. Hard. 326. (m) Yet Grants, Leaſes, &c. not warranted by this Act, are good againſt the Leſſor, if a ſole Corporation, or if aggregate, ſo long as the Dean or other Head remains; for the Statute was made for the Benefit of the Succeſſor. Co. Lit. 45. a. Walker and the Dean and Chapter of Norwich, Moor 875. pl. 1223. adjudged, 1 Brownl. 21. adjudged, 2 Brownl. 158. Carter and Clacole, 1 Leon. 306, 308. Moor 593. pl. 802. and Hunt and Singleton as cited 3 Co. 60. tho' in the Report of that Caſe, Cro. Eliz. 473. 564. nothing is mentioned as to this Point; and being cited 1 Mod. 205. Atkins ſaid, he thought it an hard Caſe, conſidering that Dean and Chapter were all Perſons capable, that a Grant by them ſhould hold good during his Life, and determine by his Death, and ſaid, that Jones in his Argument, in the Caſe of Lloyd and Gregory, (which Caſe ſee 1 Jon. 405, 406. Cro. Car. 502.) denied the Caſe of Hunt and Singleton, and ſaid, that in that Caſe nothing was mentioned of this Point, and that Lord Coke followed the Report of Serjeant Bridgeman, who miſtook the Caſe; but by the Report in Jon. and Cro. it does not appear, that Jones ſaid ſo in the Caſe of Lloyd and Gregory, 10 Co. 59. this Caſe of Hunt and Singleton cited and allowed to be Law, and vide 11 Co. 78. b. Cart. 15, 16. Hard. 326. 1 Mod. 205. —— But a Grant by a Chapter that hath no Head, not warranted by the Statute, is void immediately, or not at all. Chapter of Southwell and Biſhop of Lincoln, 1 Mod. 204. 2 Mod. 56.

Provided this Act ſhall not make good any Leaſes or Grants to be made by any College or Collegiate Church in either of the Univerſities, or elſewhere, for more Years than are limited by the Private Statutes of the ſaid College.

Provided this Act ſhall not extend to any Leaſe to be made upon Surrender of any Leaſe heretofore made, or by Reaſon of any Covenant or Condition in any Leaſe heretofore made, and now continuing, ſo that it do not contain more Years than the Reſidue of the Years of the former

Leaſe now continuing, ſhall be at the Time of ſuch Leaſe to be made, nor any leſs Rent than is reſerved in the former Leaſe.

Leaſes made void by Non-reſidence. (a) 13 Eliz. cap. 20.

1. BY 13 *Eliz. cap.* 20. that Livings appointed for Eccleſiaſtical Miniſters may not by corrupt or indirect Dealings be transferred to other Uſes, it is enacted, that no Leaſe to be made of any Benefice or Eccleſiaſtical Promotion with Cure, or any Part thereof not impropriated, ſhall endure longer than while the Leſſor ſhall be ordinarily reſident and ſerving the Cure, without (b) Abſence, (c) above eighty Days in any one Year, but that every ſuch Leaſe, immediately upon (d) ſuch Abſence, ſhall ceaſe and be void, and the Incumbent ſo offending, ſhall for the ſame loſe one Year's Profit, to be diſtributed by the Ordinary, among the Poor of the Pariſh, and all charging ſuch Benefices with any Penſion or Profit out of the ſame to be yielded or paid, ſhall be void.

(a) That this is a general Statute, vide poſt. 2 Rol. Abr. 465. pl. 2. and the Notes there.

(b) Where a Parſon, tho' he had a Parſonage-houſe in his own Pariſh, reſided in another adjoining, but came every Sunday, Wedneſday, Friday and Saturday, and read Divine Service in his own Church; tho' this will make a Non-reſidence within 21 H. 8. yet it is not ſuch an Abſence for above eighty Days as to make ſuch Leaſe void. 1 Bulſt. 111. adjudged per totam Curiam, and Yelverton Juſtice ſaid, the Abſence ought to have been for eighty Days together, but for the contrary vide 1 Brownl. 208. Noy 116. Yelv. 106.

(c) So that it is not ſufficient in Pleading this Act, to ſhew he was abſent for eighty Days, for ſo he might, and return in the Night of the eightieth Day, but it muſt be ſhewed that he was abſent eighty Days & ultra. Cro. El. 88.

(d) Where a Leaſe by Parſon or Vicar for twenty-one Years being confirmed by Patron and Ordinary, determines not by Non-reſidence, occaſioned by Death of the Leſſor, for by the Statute a wilful Non-reſidence only is intended. Bayly and Murin, 1 Vent. 244, 245. adjudged, 2 Lev. 61, 62. adjudged, 3 Keb. 46. contrary to the Caſe of Mot and Hales, as ſaid to be adjudged in Cro. Eliz. 123. but by the Report of that Caſe, Moor 270. pl. 422. the Court was divided, and Judgment given againſt the Defendant by Reaſon of the Miſ-recital of the Statute. —— So if the Abſence be involuntary, the Leaſe is not void thereby, as if the Incumbent be inhibited by the Ordinary from ſerving the Cure. Moor 448.

2. Provided every Perſon allowed to have two Benefices may leaſe one of them, upon which he ſhall not be moſt ordinarily Reſident, to his Curate only, who ſhall there ſerve the Cure for him; but ſuch Leaſe ſhall endure no longer than during ſuch Curate's Reſidence, without Abſence above forty Days, in any one Year.

(e) 14 Eliz. cap. 11.

1. BY 14 *El. cap.* 10. reciting, that evil-diſpoſed Perſons had defrauded the true Meaning of the Statute of 13 *Eliz. cap.* 20. by Bonds and Covenants for enjoying Eccleſiaſtical Livings, for that ſuch Bonds and Covenants are not Leaſes, tho' they amount to as much; it is enacted, That (f) all Bonds, Contracts, Promiſes and Covenants to be made for permitting any Perſon to enjoy any Benefice or Eccleſiaſtical Promotion with Cure, or to take the Profits thereof, ſhall be adjudged of (g) ſuch Force, and not otherwiſe, as (h) Leaſes by the ſame Perſons made thereof.

(e) This is a general Act, of which Judges ought to take Notice. Hunt and Singleton, Cro. El. 564. but for this vide poſt 2 Rol. Abr. 465.

(f) Where a Parſon covenanted, that A. ſhould have his Tithe for thirteen Years, and after reſigned, and another made Parſon, who ouſted A. this Covenant was held good, for this Act intended only to make void the Covenants where the Leaſe was made void by 13 Eliz. for Non-reſidence for eighty Days, as appears by the Preamble of this Act. Rudge and Thomas, 3 Bulſt. 202. adjudged, 1 Rol. Rep. 404. and vide Cro. Eliz. 78.

(g) And therefore ſhall be good till ſuch Abſence for eighty Days, and for a Breach of Covenant before an Action will lie. Dyer 372, 373. even after the Leaſe is become void by Abſence. Cro. Eliz. 78, 245.

(h) But where a Leaſe for ſixty Years was made by a Parſon before the 13 Eliz. and a Bond given after, for the Enjoyment, it was good. Vide Coſtard and Wingate, Moor 606. pl. 836. Cro. El. 775.

2. And that all Leaſes, Bonds, *&c.* concerning Benefices and Eccleſiaſtical Livings with Cure, to be made by any Curate, ſhall be of no other Force or Continuance than if made by the Perſon beneficed himſelf, that demiſed the ſame to ſuch Curate.

3. And reciting another Act made 13 *Eliz. viz.* 13 *Eliz. cap.* 10. and that there is one Branch therein to avoid Leaſes made by Maſters and Fellows of Colleges, *&c.* it is enacted, the ſaid Branch, or any Thing therein contained, ſhall not extend to any Grant, Aſſurance, or Leaſe of any Houſes belonging to any the Perſons aforeſaid, nor to any Grounds to any ſuch Houſe appertaining, which Houſes be ſituate in any City, Borough, Town Corporate, or Market-Town, or the Suburbs of any of them, but that ſuch Houſes and Grounds may be granted, demiſed and aſſured, as they (a) might have been before the Making of that Act, or might be if that Act had not been made, ſo that ſuch Houſe be not the Capital or Dwelling-houſe uſed for the Habitation of the Perſons aboveſaid, nor have Ground to the ſame belonging, containing above ten Acres.

(a) So that this Statute ſets ſuch Houſes in Cities, &c. looſe from the Reſtriction by 13 Eliz. Hob. 269.

4. Provided, That no Leaſe ſhall be made by Force of this Act in (b) (c) Reverſion, nor without reſerving the accuſtomed yearly Rent at the leaſt, nor without charging the Leſſee with the Reparations, nor for longer Term than forty Years at the moſt; nor ſhall the Houſes be aliened, unleſs before, with, or preſently after ſufficient Aſſurance in Fee-ſimple be abſolutely made to ſuch College, *&c.* and their Succeſſors of Lands, of as good and great yearly Value at the leaſt as what ſo alienated.

(b) Becauſe by ſuch Leaſes in Reverſion, the Colleges, &c. would be excluded from having the Rent of the particular Tenants for the Time. Poph. 9.

(c) Where a Dean and Chapter leaſed ſuch Houſe for forty Years, it then being in Leaſe to another for ten Years; tho' this Leaſe was to begin immediately, yet it was held to be a Leaſe in Reverſion within the Words of the Act. Hunt and Singleton, Cro. El. 473, 564. Cart. 15. cited, 1 Vent. 246. cited, and Poph. 9. there denied; and vide the Caſe of Bayly and Munday, 2 Lev. 61, 62. 1 Vent. 245, 246. 3 Keb. 46, &c. and vide Hob. 269. —— But if a ſecond Leaſe is made to the firſt Leſſee, tho' to commence at a Day to come, it is an immediate Surrender of his old Leaſe, and ſo good. Poph. 8, 9. 2 Leon. 188. but for this vide poſt. 2 Rol. Abr. 495. pl. 7. and the Notes there.

Leaſes upon which one Third of the Rent muſt be reſerved in Corn. (d) 18 Eliz. cap. 6.

(d) This is a Private Act. Sav. 129.

BY the 18 *Eliz. cap.* 6. it is enacted, That no Leaſes ſhall be made by Colleges and Halls in *Cambridge* and *Oxford*, or by the Colleges of *Wincheſter* and *Eaton*, for Lives or Years, of any Farm, Lands, Tenements or Hereditaments, to which any (e) Tithe, arable Land, Meadow or Paſture belongs, except one Third Part at leaſt of the old Rent be reſerved in Corn, *viz.* good Wheat at 6 *s.* 8 *d.* the Quarter, or under, and good Malt at 5 *s.* the Quarter, or under, to be delivered yearly at Days prefix'd at the Colleges, *&c.* and for Default thereof to pay to the ſaid Colleges, *&c.* in Ready Money, at the Election of the Leſſees, their Executors, *&c.* after the Rate of the beſt Wheat and Malt, which in the next Market-Days at *Cambridge*, *&c.* before the Rents ſhall be due reſpectively, ſhall be ſold for, without Fraud, and that all Leaſes otherwiſe made, and all Bonds and Aſſurances to the contrary, ſhall be void.

(e) A Parſonage in London let, to which Tithe in Money only belonged, it ſeems no Part of the Rent need be reſerved in Corn. Sav. 68. adjudged by Manwood, for that the Parliament never meant the Farmer ſhould pay Corn but where they had Corn, or Land that bore an annual Crop, not of Wood, Heath, &c. but a Writ of Error was brought, and vide 1 Leon. 19, 20. Savil 129.

Concurrent Leaſes by Colleges, &c. reſtrained, Where a Leaſe in Being not to be ſurrendered, or ended Within three Years.

(a) 18 Eliz. cap. 11.

(a) This is a General Act. Vide poſt 2 Rol. Abr. 465. C. 1. and the Notes there.

1. BY 18 *Eliz. cap.* 11. reciting the (b) 13 *Eliz. cap.* 10. and that ſince that Act ſeveral Eccleſiaſtical Perſons had made Leaſes for twenty-one Years, or three Lives long before the Expiration of the former Years, contrary to the Meaning of the ſaid Statute; it is enacted, that (c) all Leaſes to be made by any of the ſaid Eccleſiaſtical, Spiritual, or Collegiate Perſons, or others of any their Eccleſiaſtical, *&c.* Lands, *&c.* whereof any former Leaſe for Years is in Being, not to be (d) ſurrendered or ended within three Years after making ſuch new Leaſe, ſhall be void.

(b) This Act being only recited, no Alteration is made as to 14 Eliz. 1 Vent. 246.

(c) Tho' there be but two Years in Being, yet a ſecond Leaſe for Life ſeems not to be good. 2 Brownl. 164. (d) Tho' there be a Leaſe in Being for more than three Years, yet if ſurrendered within three Years, it will make the ſecond Leaſe good. 2 Brownl. 164.

2. And it is alſo enacted, that every Bond and (e) Covenant for renewing or making any Leaſe contrary to the Intent of this Act, or the ſaid Act in the ſaid (f) thirteenth Year, ſhall be void.

(e) Vide notable Caſe, where Agreement to make Leaſes to one another. Moor 789. pl. 89.

(f) But as to Leaſes of Houſes in Cities, &c. by 14 Eliz. cap. 7. not being within the Reſtraint of 13 Eliz. but exempt therefrom, as if there was no ſuch Act, a Covenant for making thereof is good notwithſtanding this Act. Hob. 269. and vide 1 Vent.

43 Eliz. cap. 9.

BY 43 *Eliz. cap.* 9. it is enacted, that all Judgments (g) thereafter for the Intent to have or enjoy any Leaſe contrary to the 13 *Eliz.* and the Alterations thereof made by any other Statute, ſhall be void.

(g) This was only declaratory of what was before reſolved. Vide Moor 789.

(a) (b) (c) Eſtop-

Fol. 862.

(a) (b) (c) Eſtoppel.

(a) For the Derivation of the Word **vide** Co. Lit. 352.

(b) Eſtoppels are odious in Law, and tho' all Parties to an Indenture are bound by the Words thereof, becauſe they agree to it, yet that muſt be intended of material Words, and not of all minute and deſcriptive Words and Circumſtances. Mod. Caſes 315.

(A) Where the Plea (d) ſtands with the Deed, Record, and where not.

1. A Man ſhall not be received to take an (e) Averment directly contrary to the Record. 9 H. 6. 60.

(c) Every Eſtoppel, becauſe it concludes a Man to alledge the Truth, muſt be certain to every Intent, and not be taken by Argument or Inference. Co. Lit. 352. b. —— Every Eſtoppel ought to be a preciſe Affirmation of that which makes the Eſtoppel, and not be ſpoken impersonally, as if **ut dicitur**, &c. Co. Lit. 305. a. 352. b. (d) In the Original it is **Eſtoit.** (e) And therefore upon a Writ of Error, a Matter contrary to the Record ſhall not be aſſigned for Error, **vide** under Title **Error.**

(f) Comb. 248. S. P. per Holt Ch. Juſt.

2. (f) If a Deed be enrolled of Record, he ſhall not be after received to ſay, (g) it is not his Deed, for this is againſt the Record directly. 9 H. 6. 60.

(g) So he ſhall be eſtopped to ſay, it was not acknowledged. 1 Leon. 184. 3 Leon. 84.

3. Againſt a Deed inrolled a Man ſhall not take an Averment, that it was made (h) by Durels, for this is againſt the Record. 16 H. 7. 5. b. Curia.

(h) But whether againſt ſuch Bargain and Sale, a Man may not ſhew that it was **primo deliberat'** after the Date and Inrolment. **Vide Holland** and **Downs**, Savil 91, 138, 139. 1 Leon. 183. 2 Leon. 121. 3 Leon. 175.

(i) **Goodridge** and **Warburton** L. P. Ow. 154. adjudged, Cro. El. 128. adjudged, 1 Leon. 136, 138. and **vide** Moor 679. pl. 928.

4. (i) If a Man ſeiſed in Fee of Lands in D. conveys Part to his Wife for Life for her Jointure in Satisfaction of Dower, and dies, and after the Wife enters ſecretly into her Jointure, but waives the Poſſeſſion, and brings her Writ of Dower of the Whole, and recovers, this ſhall eſtop her to claim that for her Jointure which was aſſured to her, tho' ſhe had accepted it before the Writ of Dower brought, ſo that ſhe could not waive it; yet in as much as ſhe hath brought her Writ of Dower of the Whole, by this it is implied, that ſhe does not claim other Eſtate in any Part thereof. Co. 4. Vernon 5.

5. So it is if the Wife after ſuch Entry into her Jointure brings a Writ of Dower of the Reſt, and ſhe recovers it, ſhe ſhall by this be eſtopped to claim her Jointure into which ſhe had before entred; for by the bringing the Writ of Dower ſhe tacitly affirmed, that ſhe had not agreed to any Jointure made to her. Co. 4. Vern. 5. b.

6. If *A. B.* is outlawed by the Name of *A. B.* Eſq; and comes in *gratis*, and reverſes it for Want of Proclamations, he ſhall not be eſtopped to ſay afterwards, that he was a Knight and no Eſquire. *Mich.* 1653. between *Boyle* and *Scarborough*, *Styl.* 395, 440. ſeems to be admitted.

(B) Where the Plea ſtands with the Record, or not.

1. A Man may (a) allow a Record, and avoid it by Plea which ſtands with the Record. 9 H. 6. 60.

(a) In the Original it is Conet.

2. As if a Deed of Feoffment be inrolled in a Court of Record, the Party may ſay that nothing paſſed by the Deed, for this ſtands with the Record. 9 H. 6. 60.

3. So if a Releaſe be inrolled, he may ſay that the Releſſee had nothing in the Lands at the Making the Releaſe, for this ſtands with the Record. 9 H. 6. 60. (b) 16 H. 7. 5. b. (c) 49 E. 3. 15. (d) 12 H. 4. 12. b.

(b) Br. Eſtoppel 17. S. C.
(c) Fitz. Eſtoppel 207. S. C. Br. 49. S. C.
(d) Br. fait enroll S. C.

4. So he may ſay againſt a Fine ſur releaſe. (e) 16 H. 7. 5. b. Co. 4. Hynd. 71. b. contra 50 E. 3. 6. b. 8 H. 4. 8.

(e) Br. Eſtoppel 17. S. C.

5. In Detinue the Defendant hath Garniſhment againſt the Obligor, who pleads to iſſue, that the Conditions were not performed, and it is found againſt him; yet in Debt againſt him upon this Obligation, he may ſay he was illiterate; and it was read to him to be upon Condition where it had none, and ſo not his Deed, for this ſtands with the Deed; and this was no Plea in the Garniſhment. Dubitatur (f) 9 H. 6. 59. b. (g) 11 H. 6. 5. b. quære, for there it is objected, that the Demand was of a Deed which he then acknowledged, and he might have ſaved this by Proteſtation.

(f) Fitz. Eſtoppel 23. S. C. Br. Eſtoppel 6. S. C.
(g) Fitz. Eſtoppel 23. S. C.

6. So if in Detinue an Infant Garniſhee loſes by Iſſue tried of Conditions performed, yet in Debt thereupon againſt him, he ſhall ſay not his Deed, becauſe of Infancy. Dubitatur 9 H. 6. 60.

7. In an Indictment of Treſpaſs, if the Defendant renders himſelf, and (h) ſubmits to a Fine, yet he may after plead Not guilty in an Action of Treſpaſs for it, * for the Entry is (i) quod poſuit ſe in gratiam Regis & petit ſe admitti per finem, and ſo it ſtands with the Conuſance, that he is not Guilty. (k) 9 H. 6. 60.

(h) In the Original it is face fine.
* Fol. 863.

(i) That the Entry is Quod non vult contendere cum Domino Rege & ponit ſe, &c. and therefore in Mitigation of the Fine, Affidavits may be after brought to prove Son aſſault on the Proſecutor, or that he is not Guilty, tho' it is otherwiſe where he is found Guilty by Verdict. Queen and Templeman, Salk. 55. Far. 40.
(k) Br. Eſtoppel 6. S. C.

8. So after a Charter of Pardon pleaded and allowed in an Indictment of Felony, he may plead Not guilty. 9 H. 6. 60.

9. (l) If a Man be bound in an Obligation by the Name of J. S. de D.; yet in Debt upon this, he may ſay that there are two D.'s in the ſame County, ſcilicet, &c. and none without Addition, for this ſtands with the Deed, for he acknowledges the Obligation, and more. (m) 14 H. 6. 8.

(l) Moor 48. pl. 155. S. P.
(m) Fitz. Eſtoppel 31. S. C. Br. 107. S. C.

10. When the Truth is apparent in the ſame Record, the adverſe Party ſhall not be eſtopped to take Advantage thereof, for he cannot be eſtopped to alledge the Truth when it appears of Record. *Co. Lit.* 352. *b.*

11. If a Fine is levied without any Original, it is voidable, and not void; but if an Original be brought, and a *Retraxit* entered, and after that a Concord is made, or a Fine levied, this is void in Reſpect the Truth appears of Record. *Co. Lit.* 352. *b.*

Upon Records.

(C) In what Caſes a Man ſhall be eſtopped.

1. A Man ſhall not be received to aver any Thing againſt the Certificate of a Judge.

2. If (a) one acknowledges a Fine in my Name of my Lands, it ſhall bind me (b) perpetually, for I cannot ſay, that I was not Party to the Fine. (c) 19 H. 6. 44, 58. b.

(a) If one of my Name levies a Fine of my Land, I may confeſs and avoid the Fine, by ſhewing the Special Matter which ſtands with the Fine; but otherwiſe if levied by another in my Name. Cro. El. 531. ſaid by Poph. in Higham's Caſe, that he had always noted this Difference. (b) But if the Fraud be made appear to the Court, they may order a Vacat to be entered. Vide Higham's Caſe, Cro. El. 531. Moor 630. pl. 866. Noy 99. 12 Co. 123. cited, and ſaid there was no Sentence to draw the Fine from the File; but where ſuch Vacat ſhall be made, vide the Additions and Notes under Title Vacat, 2 Rol. Abr. 724. (c) Fitz. Diſceit 10. S. C. Br. Fines de terre 54. S. C. Br. Eſtoppel 182. S. C.

3. So in a Præcipe quod reddat againſt A. if B. comes by the Name of A. and acknowledges the Action, this will bind him perpetually, (d) and he hath no Remedy but a Writ of Diſceit againſt B. (e) 19 H. 6. 44.

(d) By the Stat. 21 Jac. 1. c. 26. to acknowledge any Fine, Recovery, &c. or Judgment in the Name of another, is made Felony without Benefit of Clergy. (e) Fitz. Diſceit 10. S. C. Br. Fines de terre 54. S. C. Br. Eſtoppel 182. S. C. My firſt Part 191. G. 1. S. C.

4. So if one be vouched, and a Stranger upon the Summons returned comes as Vouchee, and acknowledges the Action, it ſhall bind the Vouchee. (f) 19 H. 6. 44.

(f) Fitz. Diſceit 10. S. C. Br. Eſtoppel 182. S. C.

5. So a Man ſhall not be received to ſay, that he is not the ſame Perſon which acknowledged a Recognizance. (g) 19 H. 6. 44.

(g) Br. Eſtoppel 182. S. C.

6. So if one acknowledges a Statute-Merchant or Staple in my Name, it ſhall bind me, and I have no other Remedy but a Writ of Diſceit againſt him that acknowledged it. (h) 19 H. 6. 44.

(h) Br. Fines de terre 54. S. C. Br. Eſtoppel 182. S. C.

7. If A. is bound to B. in 20 l. by Obligation, and B. by another Deed promiſes in Conſideration of 5 l. paid by A. to him, that he will not proſecute any Action againſt A. before ſuch a Day, and in Default thereof that he will forfeit 10 l. in an Action of Debt by A. againſt B. for the 10 l. upon this laſt Deed he avers, that B. before the Day, proſecuted an original Writ out of Chancery againſt him, and ſhews the Subſtance of the Writ returnable in Banco at a certain Day, and at the Day of the Return the ſaid B. by J. S. his Attorney obtulit ſe againſt A. de placito prædict', and the ſaid A. non venit, and the Sheriff then returned, that the ſaid B. had found Pledges de proſequendo breve illud prout per recordum, &c. it is not any Plea for B. to ſay, that he, after the Making the Deed, and before the ſaid Day, did not proſecute out of the ſaid Court of Chancery againſt the ſaid A. in Manner and Form, prout, &c. & de hoc ponit ſe ſuper Patriam,

(a) for he is eſtopped ſo to ſay againſt the Record. Trin. 22 Car. B. R. between Harriſon and Cheſtor adjudged. Intratur Paſch. 21 Car.

(a) Where one ſhall be eſtopped to ſay, that a Writ iſſued after the Teſte. Lutw. 334. — But whether it may not be ſo found by Verdict, vide Bayly and Bunning. 1 Lev. 173. 1 Sid. 271. 1 Keb. 930, 932. 2 Keb. 32. —— Whether the Defendant ſhall be eſtopped to ſay, that the Plaintiff's Teſtator was dead when a Writ was ſued out in his Name. Lutw. 254.

(D) (b) What (c) (d) Records ſhall eſtop.

(b) Where one ſhall not be eſtopped by a Judgment which is reverſed. Riche's Caſe, 3 Leon. 52. Dalt. 100.

1. (e) A Record of a Thing, of which the Court where the Record is hath no Juriſdiction of the Cauſe, ſhall not be any Eſtoppel in another Action. (f) 10 H. 6. 13. b. for it is coram non judice.

(c) Where the Finding upon an Inquiſition poſt mortem, no Eſtoppel. Vid. 13 Co. 61, 62. and vide 4 Inſt. 207, 208. (d) Where one ſhall be eſtopped by praying Oyer of a Record or Deed. Lutw. 1644. Salk. 7.
(e) Kelw. 55. a. L. P. (f) Fitz. Eſtoppel 18. S. C. Br. 215. S. C.

2. As a Record in the Marſhalſea where neither of the Parties is of the Houſhold. (g) 10 H. 6. 13.

(g) Fitz. Eſtoppel 18. S. C. Br. 215. S. C.

3. So a Record in B. R. upon a Formedon ſhall not be any Eſtoppel, for it is coram non judice. 10 H. 6. 13.

Fol. 864.

4. So a Fine received there ſhall not be any Eſtoppel, but it is void. 10 H. 6. 13. b.

5. If a Man purchaſes a Licence of Alienation of the King, (h) yet he may after ſay, that the Land is not held of the King, and he ſhall not be eſtopped by the Charter. (i) 29 Aſſ. 38. adjudged.

(h) Where one purchaſed a Licence or Pardon, and after was called into the Exchequer to plead them, neither the Purchaſe or Pleading was any Concluſion, but the Tenure might be after denied, for the Words of the Licence, &c. were de nobis tenentur in Capite ut dicitur. 4 Inſt. 111. ſaid to be reſolved by all the Judges. (i) Br. Eſtoppel 134. S. C.

6. If J. S. be ſeiſed of Land of the Feoffment of J. N. and after acknowledges in Chancery, that J. N. was aiding to the King's Enemies, and by Patent accepts a Grant of the Lands from the King claiming nothing in the Freehold, he ſhall be eſtopped to ſay after againſt the King, that J. N. enfeoffed him of the Land againſt his own Acceptance. (k) 43 Aſſ. 28. adjudged.

(k) Office de Eſcheator 23. S. C.

7. If a Leſſee abates a Writ of Waſte, becauſe the Writ ſuppoſes him to be in of the Leaſe of the Plaintiff, where he is in of the Leaſe of the Plaintiff and B. it ſhall eſtop him in a new Action by thoſe Two, to ſay he is in of the Leaſe of one of them only. (l) 46 E. 3. 20. b. Dubitatur.

(l) Br. Waſte 46. S. C.

8. In an Action of Waſte againſt B. ſuppoſing him to be in of his Leaſe, where in Truth B. is ſeiſed in Fee, if B. pleads no Waſte done, and it is found for B. upon which Judgment is given, that the Plaintiff ſhall take nothing by his Writ, yet B. ſhall be eſtopped after to ſay, that he is ſeiſed in Fee, and not in of the Leaſe of the Plaintiff. 36 H. 6. 29.

9. In a Ceſſavit, if the Tenant confeſſes the Tenure, and tenders the Arrears, and is adjudged to find Sureties according to the Statute, in a Writ of Cuſtoms and Services brought by the Lord againſt him, he cannot diſclaim againſt his Acceptance aforeſaid. (m) 50 E. 3. 23.

(m) Fitz. Eſtoppel 209. S. C. Br. 50. S. C.

10. If

10. If Debt be brought upon an Obligation, ſuppoſing it to be made there, where they are at Iſſue, whether made by Dureſs; pending this he may bring an Action in another County, and ſuppoſe the Obligation to be made there. (a) 7 H. 4. 8.

(a) Br. Eſtoppel 54. S. C. Fitz. Brief 225. S. C. Br. 108. S. C.

11. In a ſecond Scire facias upon a Fine, a Man may vary from the lineal Deſcent that he made in the firſt Writ, for tho' he made the Deſcent ill before, he ſhall not be eſtopped by it to make the Deſcent in a better Manner. 13 H. 4. 14.

12. In Debt upon an Obligation, if the Defendant pleads Non eſt factum, yet he may bring a Detinue for it againſt another, and he ſhall not be eſtopped to demand it by the Name De Scripto obligatorio. (b) 20 H. 6. 45.

(b) Fitz. Eſtoppel 37. S. C.

13. In Treſpaſs for Breaking his Cloſe, if they are at Iſſue upon the Freehold, the Plaintiff is eſtopped to ſay, that the Defendant is but Leſſee for Years. Dubitatur 3 H. 4. pl. 2. Quære, Whether the Iſſue hath not (c) ſet all at large.

(c) In the Original it is fait.

(d) Not denying.

(d) In the Original it is nient dedire.

14. If a Prior prays in Aid becauſe he is preſentable, and the Defendant ſays he hath a Convent and common Seal, if he does not deny it but demurs, upon which he is ouſted of Aid, he ſhall be after eſtopped to ſay in the ſame Plea, that he hath no Convent or common Seal, for that is confeſſed by his not denying it. (e) 11 H. 4. 69.

(e) Br. Eſtoppel 65. S. C. Fitz. Scire facias 71. S. C.

15. If Leſſee prays in Aid, and the Demandant ſays he is ſeiſed in Fee, and this is not denied by him, upon which he is ouſted of Aid, he ſhall not after ſay, he is Tenant for Life, and vouch the Reverſioner. (f) 11 H. 4. 69.

(f) Br. Aid 50. S. C. Fitz. Scire facias 71. S. C.

(g) Vide 13 Co. 61, 62.

16. (g) By ſuing of a general Livery the Heir was concluded as to the Tenure. 4 *Inſt.* 197.

(h) Vide 13 Co. 61, 62.

17. (h) But otherwiſe it was as to a Special Livery, for that as to the Tenure was but *ut dicitur*. 4 *Inſt.* 197.

(i) But then it muſt be pleaded as an Appearance. Salk. 8.

(k) Salk. 3. S. C.

18. If one puts in Bail by a wrong Name, (i) he ſhall be concluded thereby in the Caſe of (k) *Smith* and *Villars*, *Fareſ.* 38. agreed *per Curiam*; and in a Civil Action he need not join in the Recognizance; and in the Caſe of the Earl of *Banbury*, who was indicted by the Name of *George Knowles*, Eſq; tho' by the Courſe of the Court he ought to have joined in the Recognizance; yet becauſe if he had entered into one by the Name of *G. K.* it would have been an Eſtoppel upon him, he was indulged to bring others, who gave Bail for him by the Name of *G. K.* Eſq; for their Act could not conclude him.

By Record by Conuſance.

(E) What (a) Perſons ſhall be eſtopped by Conuſance.

(a) The King ſhall not be bound by an Eſtoppel. 2 Rol. Rep. 304.

1. IN an Aſſiſe againſt Baron and Feme, if they plead a Feoffment by Deed of J. S. * after the Death of M. by which he was Tenant after Poſſibility, and the Plaintiff ſays, that the Feoffment was in the Life of M. ſo that he was Tenant in Tail at the Feoffment, in another Action the Wife after the Death of the Husband ſhall not be eſtopped to ſay, that nothing paſſed by the ſaid Deed of Feoffment, tho' it was acknowledged to the contrary before, becauſe ſhe was then a Feme Covert. (b) 32 Aſſ. 9. adjudged.

* Fol. 865.

(b) Br. Eſtoppel 140. S. C.

2. If A. demands Lands as Heir to B. againſt Baron and Feme, and they traverſe the Action, and it is found againſt them, yet after the Death of the Husband the Wife may ſay, in another Action, that the Demandant is a Baſtard, (c) for the Admittance during the Coverture ſhall not bind her. (d) 32 Aſſ. 9. quære.

(c) Yet ſhe may be eſtopped by a Fine levied. Moor 694. pl. 869. —— Not by giving a Bail-Bond as a Feme Sole. Linch and Hook, 6 Mod. 311. Sal. 7.

(d) Br. Eſtoppel 140. S. C.

3. If A. ſeiſed in Fee of Land is diſſeiſed thereof by B. and during the Diſſeiſin a Præcipe is brought thereof by D. againſt A. who (e) ſuffers a Common Recovery thereof to the Uſe of D. the Recoveror, tho' this is in Truth a void Recovery for Want of a Tenant to the Præcipe, yet it ſhall be a good Recovery by Eſtoppel to bind A. his Heirs and Aſſigns. Mich. 10 Car. B. R. between (f) Bull and Wyott. Intratur Trin. 9 Car. Rot. 514. adjudged upon a Special Verdict.

(e) So a Fine levied by Diſſeiſee, or him that hath nothing, operates by Eſtoppel. 2 And. 79.

3 Co. 51. 3 Co. 90. a. Cro. Jac. 175. —— How a Fine levied by a Diſſeiſee to a Stranger ſhall operate. Vide 2 Co. 56. a. Goulſ. 162. Cro. Car. 484. 1 Jon. 316, 398. March 105. K. 3. S. C. Cro. Car. 388, 389. S. C. adjudged.

(f) 1 Rol. Abr. 868.

4. (g) If Tenant in Fee-ſimple makes a Leaſe for Life, and then ſuffers a Recovery, both he and his Heir ſhall be for ever concluded. 1 *Co.* 96. *b.*

(g) Cro. Eliz. 21. S. P. Moor 257. pl. 405. S. P.

Duke and Smith, S. P. 4 Leon. 238. adjudged, Godb. 147. adjudged.

5. (h) But if there be Tenant in Tail of a Reverſion expectant upon an Eſtate for Life, and he ſuffers a Recovery, and hath Judgment to recover over in Value, yet his Iſſue ſhall avoid this Recovery, and ſhall not be eſtopped claiming *per formam doni.* 1 *Co.* 96. *b.*

(h) 3 Co. 6. b. S. P. Moor 257, 258. pl. 405. S. P.

6. Where there was Tenant for Life, Remainder to Baron and Feme and their Heirs, and the Baron and Feme ſuffered a Recovery. *Hill.* 1651. between *Lochoe* and *Palfriman*, *Styl.* 319, 320. *per Rolle* Ch. Juſt. it is not neceſſary to examine a Feme Covert upon a Recovery, tho' it be prudential ſo to do; but if it be not done, it cannot be averred not to be done, and ſhe joining in the Recovery is eſtopped (i) thereby, and ſo will her Heirs be alſo, and Judgment *niſi* accordingly given.

(i) But where ſhe ſhall not be eſtopped by a Deed, vide in the Caſe of Brereton and Evans, Cro. El. 701.

Eſtoppel by Confeſſion, &c.

(F) In what Caſes a Man ſhall be eſtopped by (a) Verdict, Confeſſion, (b) &c. not where it ſtands with the Verdict.

(a) Vide Dal. 108, 109.

(b) By Tenants pleading to a Writ of Right in Banco, without taking the Tenure by Proteſtation. 2 Inſt. 39.

1. THE Iſſue is as high in a Writ of Treſpaſs if it be taken in the Realty, as in an Aſſiſe. (c) 7 H. 6. 9.

(c) Fitz. Eſtoppel 20. S. C.

2. In an Action, if the Iſſue be, whether the Anceſtor of the Defendant died ſeiſed, and it is found that he did; in another Action the Plaintiff may ſay, that he himſelf made continual Claim before the Death of the Anceſtor, &c. for this is not contrary to the Verdict, for the Jury could not inquire of the continual Claim, but of the Dying ſeiſed. Dubitatur (d) 7 H. 6. 8. b. 20.

(d) Fitz. Eſtoppel 20. S. C. Br. 77. S. C.

3. So in an Action, if the Tenant ſays, that his Anceſtor died ſeiſed, and he is his Heir within Age, upon which he hath his Age, he may after ſay, that his Anceſtor had nothing but by Diſſeiſin, for this ſtands with the firſt Plea. Dubitatur 7 H. 6. 9.

4. So if a Releaſe be pleaded in Bar, and the Plaintiff denies it, and it is found againſt him, he ſhall be after eſtopped to ſay, that it was made by Dureſs. 7 H. 6. 9.

5. So he cannot after ſay, that nothing paſſed by the Deed. 7 H. 6. 9.

6. If a Man would avoid a Deed, becauſe it was made when he was within Age, and it is found againſt him, he cannot afterwards ſay, that he made it by Dureſs; for by the firſt Plea he confeſſes the Deed to be good in all Points but for the Infancy. (e) 7 H. 6. 9.

(e) Br. Eſtoppel 77. S. C.

7. In Dower the Tenant may ſay, never ſeiſed, &c. and after never accoupled. (f) 7 H. 6. 8. b.

(f) Br. Eſtoppel 77. S. C.

8. In an Aſſiſe of Mortdanceſtor, the Tenant may ſay, that he is not Tenant, and at another Time may ſay, that the Demandant is a Baſtard. (g) 7 H. 6. 8. b.

(g) Br. Eſtoppel 77. S. C.

9. In a Mortdanceſtor, if the Tenant traverſes the Action, and it is found againſt him, the Tenant in another Action cannot ſay, that the Demandant is a Baſtard, for it was acknowledged before, *contra* when he pleaded to the Action. (h) 32 Aſſ. 9. admit if the Tenant had not been Covert.

(h) Br. Eſtoppel 140. S. C.

10. In a Writ of Aiel, ſuppoſing his Grandfather to be named J. if the Defendant ſays he was named W. and it was found that his Name was J. according to the Writ, * and he recovers, and after he brings another Writ for other Land of the ſame Anceſtor againſt the ſame Tenant, he may ſay that the Father of the Plaintiff was a Baſtard, tho' in the other Action it was not denied, that he was legitimate. (i) 30 Aſſ. 51.

* Fol. 866.

(i) Br. Eſtoppel 138. S. C.

11. If a Man brings a Writ of Ward againſt the Mulier, ſuppoſing the Baſtard to be Heir to his Tenant, and in Ward, and the Defendant does not deny that he is Heir, but takes a Traverſe upon any Point which is found againſt him, he ſhall by this be diſinherited perpetually. (k) 30 Aſſ. 51.

(k) Br. Eſtoppel 138. S. C. Br. Mortdanceſtor 56. S. C.

12. In a Mortdanceſtor brought by the Baſtard againſt the Mulier, if the Mulier ſays he is the Eldeſt, not ſaying that the Plaintiff is a Baſtard, and it is found the Baſtard is the Eldeſt, the Mulier ſhall never be received after to ſay, that he is a Baſtard. 30 Aſſ. 51. per Finchden.

13. In an Aſſiſe, if the Tenant ſays, that A. died ſeiſed, and he as Mulier entered, and the Plaintiff being a Baſtard ouſted him; and the Plaintiff ſays, that J. S. enfeoffed him, by which he was ſeiſed till by the Tenant diſſeiſed, by this Plea he hath acknowledged himſelf to be a Baſtard, and therefore in another Action he ſhall not ſay, that he is a Mulier. 42 Aſſ. 20.

14. In an ad terminum qui præteriit, if the Tenant ſhews forth the Deed of the Anceſtor of the Plaintiff by which he aliened to him in Fee, upon which the Plaintiff maintains his Writ, if it be found againſt the Plaintiff he ſhall not after be received to ſay, that nothing paſſed by the Deed. (a) 32 Aſſ. 9. per Thorpe. (a) Br. Eſtoppel 140. S. C.

15. In an Aſſiſe, if the Tenant pleads that J. S. made a Feoffment by this Deed after the Death of M. by which he was Tenant after Poſſibility, and the Plaintiff ſays, that he enfeoffed by Deed in the Life of M. ſo that he was Tenant in Tail at the Time of the Feoffment, upon which they are at Iſſue, and it is found for the Plaintiff: In another Action, if this Deed of Feoffment be pleaded, the Tenant in the firſt Action cannot ſay, that nothing paſſed by the Deed of Feoffment, becauſe it was confeſſed in the other Action. Vide Dubitatur (b) 32 Aſſ. 9. (b) Br. Eſtoppel 140. S. C.

16. In an Aſſiſe, if a Recovery be pleaded, and the other might have falſified it, but does not, but takes Iſſue upon another Matter which is found againſt him, he ſhall be eſtopped by this Admittance, ſo that he ſhall not be received to falſify this Recovery in any other Action. (c) 40 Aſſ. 4. Curia. (c) Br. Fauxifier de, &c. pl. 39. S. C.

Eſtoppel by Verdict.

(G) In what Caſes a Man ſhall be eſtopped.

By a Thing not material.

1. IN a Mortdanceſtor as Heir to B. if the Tenant ſays, that A. was ſeiſed, and infeoffed the ſaid B. and him and his Heirs, and the Demandant ſays the Tenant had nothing therein (d) but as Feme, upon which the Aſſiſe finds the Purchaſe as the Tenant hath alledged, by which the Demandant is barred; in a new Aſſiſe by the Demandant, he ſhall be eſtopped by the ſaid Verdict to ſay, that the Purchaſe was by B. and the Tenant, and the Heir of B. tho' the Effect of the Plea before was not, whether the Tenant had a Fee, or only for Life, for the Demandant was to be barred, tho' he had but for Life. (e) 45 Aſſ. 15. adjudged it ſeems, for that this was put in Manner in Iſſue. (d) In the Original it is forſque come feme. (e) Br. Eſtoppel 148. S. C.

2. Where one brought a Writ of Error upon a Judgment in Dower againſt him, and aſſigned for Error, that he was within Age and appeared by Attorney, and Iſſue being joined upon the Nonage, and found for the Plaintiff in Error, the Defendant therein would have ſtaid Judgment,

ment, becauſe in the Aſſignment of Error it was alledged, that 7 *Sept.* 20 *Car.* 2. he was of the Age of Fourteen, *& non amplius*, and the Writ of Error was brought 4 *July*, 26 *Car.* 2. and in *Michaelmas-Term* following, and Error aſſigned by Attorney, when he could not be of the Age of twenty-one, according to his own Allegation; but the Subſtance of the Iſſue being, whether he was within Age, and the *Viz.* no material Part of the Iſſue, it was held no Eſtoppel. *Mich.* 26 *Car.* 2. between (a) *Morgan* and *Vaughan*, 2 *Jon.* 170. *per Cur'*, but no Judgment.

(a) Raym. 456. S. C. and ſaid that Judgment was reverſed. Skin. 10. S. C. but no Judgment.

Fol. 867.

Eſtoppel upon Records after Nonſuit.

(H) In what Caſes a Man ſhall be eſtopped after Nonſuit.

(b) Fitz. Eſtoppel 99. S. C. Br. 62. S. C.

1. IF the Plaintiff denies a Deed by Traverſe, if he be after Nonſuit, he cannot affirm the Deed. Contra (b) 11 H. 4. 30.

2. If a Deed be pleaded in Bar, and the Plaintiff ſays, that he made it by Dureſs of Impriſonment, and after the Plaintiff is Nonſuit, in a new Action he cannot ſay, that he was within Age at the Making, for he (c) admitted the Deed good before in every Point, but for the Dureſs. (d) 45 E. 3. 2. b. (e) 7 H. 6. 20. 14 H. 6. 9. b.

(c) In the Original it is accept.

(d) Br. Eſtoppel 39. S. C. Fitz. 199. S. C.

(e) Br. Eſtoppel 77. S. C. Fitz. 20. S. C.

(f) Fitz. Eſtoppel 96. S. C.

3. So in ſuch Caſe he cannot ſay it is not his Deed. (f) 6 H. 4. 4. b.

(g) In the Original it is Conus.

4. In an Aſſiſe, if the Plaintiff (g) confeſſes a Matter againſt himſelf, and after is Nonſuit, yet in a new Action he ſhall be eſtopped thereby. 18 E. 3. 35.

5. In an Aſſiſe, if it be found by Verdict, that the Plaintiff was not ſeiſed, nor diſſeiſed, and after, before Judgment, he is Nonſuit; in a new Aſſiſe he ſhall not be eſtopped by this Verdict, becauſe he now cannot have an Attaint upon this Verdict. 18 E. 3. 35. Curia. (h) 17 Aſſ. 27. adjudged.

(h) Br. Eſtoppel 126. S. C.

6. In an Aſſiſe, if on Pleading a Releaſe the Plaintiff denies it, and it is found by Verdict, that it is a good Deed, and after the Plaintiff is Nonſuit upon an Adjournment, he ſhall not be eſtopped by this Verdict to deny the Deed in a new Action. (i) 18 E. 3. 35. 17 Aſſ. 28. adjudged.

(i) Fitz. Eſtoppel 223. S. C.

7. In Debt upon an Obligation, if the Plaintiff counts of the Making in one Place after Nonſuit, he cannot alledge it in another Place. Dubitatur (k) 14 H. 6. 9. b.

(k) Br. Eſtoppel 108. S. C.

8. If a Deed be pleaded in Bar, which is pleaded to be made by Dureſs of Impriſonment at D. and after the Plaintiff is Nonſuit, in a new Action he cannot vary from the Place. (l) 45 E. 3. 2.

(l) Br. Eſtoppel 39. S. C. Fitz. 199. S. C.

9. In falſe Impriſonment, if the Plaintiff counts of an Impriſonment in one Place, after Nonſuit he may alledge it in another Place, for the Place is not material. Contra 14 H. 6. 9. b.

10. In an Aſſiſe by A. B. and C. againſt D. if they make their Plaint, and after the Writ abates by Nonſuit, A. and B. only may bring a new Writ, tho' C. be living; for if they miſtook their Writ before,

before, they ſhall not be thereby ouſted of a good Writ perpetually. 31 Aſſ. (*) 15. adjudged.

(*) This is printed here as in the Original, but ſhould be 14, which vide Br. Eſtoppel 192. Fitz. Eſtoppel 140.

(a) Suppoſal.

(a) Where one avows for Rent due at a Day, and is Nonſuit, he may avow for the ſame Rent, and ſuppoſe it due at another Day, and ſhall not be eſtopped by the Record on which he is Nonſuit. 2 Leon. 3.

11. A Suppoſal in a Writ ſhall not eſtop a Man if he be Nonſuit in bringing a new Writ. 6 H. 4. 4. b.

12. In a Mortdanceſtor, if the Plaintiff ſuppoſes his Anceſtor's Name to be W. if he be Nonſuit, he may ſuppoſe his Name in another Writ to be L. (b) 46 E. 3. 18.

(b) Br. Eſtoppel 44. S. C.

13. So in a Formedon. (c) 6 H. 4. 4. b.

(c) Fitz. Eſtoppel 96. S. C.

14. If a Man in a Mortdanceſtor ſuppoſes that his Father died ſeiſed in Fee, after Nonſuit he may bring a Formedon, ſuppoſing him to have had an Eſtate-tail. (d) 6 H. 4. 5.

(d) Fitz. Eſtoppel 96. S. C.

15. In a Writ of Coſenage, if the Plaintiff makes himſelf Heir to one Anceſtor, after Nonſuit he may bring a Formedon, or other Writ for the ſame Land, becauſe his firſt Writ was but a Suppoſal. (e) 3 H. 6. 15. b.

(e) Fitz. Eſtoppel 15. S. C. Br. 1. S. C.

16. In Debt upon an Obligation, if the Plaintiff alledges the making at L. after Nonſuit, in a new Action he may alledge the Making in another County without any Eſtoppel. (f) 6 H. 4. 4. b. adjudged.

(f) Fitz. Eſtoppel 96. S. C.

17. In an Aſſiſe, if the Tenant pleads a Recovery in a Mortdanceſtor againſt the Anceſtor of the Demandant, which the Demandant would avoid by Falſe Latin, and after the Demandant is Nonſuit, in another Aſſiſe he may avoid the ſaid Recovery, by ſaying his Anceſtor was not Tenant of the Freehold at the Time of the Recovery, and he ſhall not be eſtopped by his Admittance in the firſt Aſſiſe, becauſe he is at large by the Nonſuit. (g) 19 Aſſ. 4. adjudged.

Fol. 868.

(g) Br. Eſtoppel 128. S. C.

18. Matters alledged by Way of Suppoſals in Counts ſhall not conclude after Nonſuit: Otherwiſe it is after Judgment given; and tho' after Nonſuit the Suppoſal in the Count ſhall not conclude, yet the bar Title, *Replication*, or other Pleading of either Party, which is preciſely alledged, ſhall conclude after Nonſuit. *Co. Lit.* 352. *b.* and there ſaid hereby the Books are reconciled.

(I) In what Caſes a Man ſhall be eſtopped after Diſcontinuance.

1. IN Debt upon an Obligation, if the Defendant pleads Payment according to the Condition in one Place, if it be diſcontinued by the King's Death, in a new Original he may alledge Payment in another Place. (h) 3 H. 4. 9.

(h) Fitz. Eſtoppel 95. S. C. Br. 53. S. C.

2. But it is otherways if the Plaintiff ſues a Reſummons on the firſt Original. (i) 3 H. 4. 9.

(i) Fitz. Eſtoppel 95. Br. 53. S. C.

Eſtoppel by Record.

(K) Who ſhall be eſtopped.

(a) Stranger.

(a) If a Man takes a Leaſe of his own Land by Indenture, and after dies without Heirs, the Lord in Point of his Eſcheat ſhall not be bound thereby. Per 1 Leon. 158. but Co. Lit. 352. a. at the Bottom, ſeems contrary.

1. A Man ſhall not be eſtopped by a Verdict between Strangers to which he was no Party, where he is to loſe any Inheritance by it, but he may aver the contrary thereof. 11 H. 6. 46. b.

2. But a Man ſhall be eſtopped by a Verdict between Strangers to plead a Matter contrary thereto in Abatement of the Writ, for that he is not to receive any Diſinheritance thereby, to avoid contrary Verdicts. 11 H. 6. 46. b.

3. If A. diſſeiſes B. of Land, and after B. ſuffers a Common Recovery of the Land in which the Præcipe is brought againſt B. and the Record is, that the Sheriff put the Recoveror in Poſſeſſion of the Land, upon a Writ of Habere facias Seiſinam, and after C. a Stranger enters upon A. and diſſeiſes him, upon which the Recoveror enters, his Entry is lawful; for tho' B. was not Tenant to the Præcipe, yet it was a good Recovery by Eſtoppel againſt B. his Heirs and Aſſigns (it being Fee-ſimple Land) and binds all but A. who was ſeiſed of the Land at the Time of the Recovery, and ſo by Conſequence ſhall eſtop C. who does not claim under A. but came in after the Recovery by Diſſeiſin. Mich. 10 Car. B. R. between (b) Bull and Wyatt, per Curiam adjudged upon a Special Verdict, none attending on the other Side. Intratur Trin. 9 Car. Rot. 514.

(b) 1 Rol. Abr. 865. E. 3. S. C. Cro. Car. 388, 389. S. C. adjudged.

4. Regularly a Stranger ſhall not be bound by nor take Advantage of an Eſtoppel. *Co. Lit.* 352. *a.*

5. Privies in Blood as Heirs, Privies in Eſtate, as the Feoffee, Leſſee, *&c.* Privies in Law, as Lords by Eſcheat, Tenant by the Curteſy, Tenant in Dower, the Incumbent of a Benefice, and others that come under by Act in Law, or in the *Poſt*, ſhall be bound and take Advantage of Eſtoppels. *Co. Lit.* 352. *a.*

(L) Who ſhall take Advantage of an Eſtoppel.

He who claims under it.

(c) Co. Lit. 352. a. at the Bottom, S. P. (d) Br. Eſtoppel 51. S. C. Fitz. 93. S. C.

1. (c) A Woman that claims Dower ſhall have Advantage of an Eſtoppel by Deed between her Husband and the Tenant. (d) 3 H. 4. 6. Dubitatur.

2. If one leaſes for Life by Indenture, and after levies a Fine of the Reverſion, the Conuſee ſhall eſtop the Leſſee in a Quid juris clamat, to ſay that the Conuſor had nothing in the Land. (a) 3 H. 4. 6. (a) Br. Eſtoppel 51. S. C.

3. If a Man recovers a Rent-Charge without Title in an Aſſiſe againſt the Tenant of the Land, and after the Tenant aliens the Land, the Alienee ſhall be eſtopped * by this Recovery as well as the Alienor, becauſe he comes under the Charge. 30 E. 3. 21. b. * Fol. 869.

4. If J. S. be eſtopped to claim any Eſtate in certain Lands, and J. D. hath gained the Eſtate by Eſtoppel, and J. D. enters upon the Land, and a Stranger comes in Aid of him, if Treſpaſs be brought againſt the Stranger, he may well juſtify and take Advantage of the Eſtoppel, for he claims in the Right of him that is privy. Contra (b) 14 H. 6. 22. b. Curia. (b) Fitz. Eſtoppel 32. S. C. Br. 96, 109. S. C.

Stranger.

5. A Stranger to the Record ſhall not have Advantage of the Record to eſtop the Party. (c) 46 E. 3. 18. (c) Br. Eſtoppel 44. S. C.

6. If an Infant makes a Deed, he ſhall not be eſtopped to avoid it, for that he being in Ward to the King before the Making of it in Chancery proved himſelf of full Age, and ſued Livery (becauſe the other is a Stranger to this, as it ſeems). (d) 46 E. 3. 33. (d) Fitz. Eſtoppel 206. S. C. Br. 46. S. C.

7. In Debt againſt one as Adminiſtrator, he cannot plead that the Plaintiff hath another Writ againſt J. S. as Executor, becauſe he is a Stranger thereto. (e) 3 H. 6. 14. (e) Br. Debt 3. S. C. Fitz. Eſtoppel 14. S. C.

8. So in a Writ of Eſcheat upon the Death of J. without Heir, the Defendant cannot ſay that in another Action by a Stranger againſt this Plaintiff, the Plaintiff had vouched as Heir to the ſaid J. for he is a Stranger to that Record. (f) 3 H. 6. 14. (f) Fitz. Eſtoppel 14. S. C.

9. In a Real Action, if the Tenant vouches J. S. to Warranty, and after J. S. brings a Real Action againſt the Tenant for the ſame Land, he ſhall eſtop the Tenant to plead Non-tenure pending the Summons ad warrantiam againſt him, for he is no Stranger to the firſt Record. Dubitatur 17 E. 3. 43. b.

10. In a Writ of Right of Ward for A. the Daughter and Heir of J. S. if the Defendant claims to be Brother and Heir of J. S. abſque hoc, that A. is Daughter and Heir of J. S. upon which they are at Iſſue, and this is found againſt the Defendant, and thereupon Judgment is given; if the Brother after brings an Aſſiſe againſt A. the Daughter for the Land, ſhe ſhall eſtop him from claiming as Heir to J. S. tho' the firſt Writ was but for the Body, and tho' ſhe is not Party or Privy to the Record, for the Plaintiff is privy enough to have Attaint or Error, and the ſame Matter is to be put in Iſſue, which was before, and ſo there may be contrary Verdicts, which the Law abhors. Contra (g) 30 Aſſ. 46, 51. adjudged. Curia. (g) Br. Eſtoppel 138. S. C. Br. Mortdanceſtor 56. S. C.

11. In a Writ of Dower againſt a Guardian, if the Iſſue be, whether ſhe was the Wife of the Father of the Heir, and it is found by the Verdict that ſhe was not, the Heir ſhall eſtop her by this Verdict to claim her Dower, tho' he is not privy to it (h) wholly, but he is in a manner Party, for that he ſhould be (h) In the Original it is tout ouſterment,

bound

bound by this, if it had been found againſt the Guardian. (a) 30 Aſſ. 51.

(a) Br. Eſtoppel 138. S. C.

12. If an Action be brought againſt J. S. Knight and Baronet, where he is no Baronet, but only a Knight, and the Defendant appears and (b) pleads, and after Judgment is given againſt him, if he be after taken in Execution upon this Judgment by the Sheriff, upon a Writ of Execution directed to him to take J. S. Knight and Baronet, he ſhall be eſtopped by this Judgment to maintain an Action againſt the Sheriff. My Reports 14 Jac. B. R. between (c) Markham and Sir Francis Forteſcue, reſolved per Curiam.

(b) But quere if the Judgment had been by Default. 1 Rol. Rep. 88.

(c) 1 Rol. Rep. 461. S. C. adjudged, Cro. Jac. 482. S. C. and vide 2 Brownl. 48. 1 Rol. Abr. 781. M. 3. 791. F. 5.

13. If A. bring an Action in Banco againſt Julian Goddard, an (d) unmarried Woman, where the Parties are at Iſſue, and a Venire is awarded, and before the Return thereof the Woman takes Husband, one Doyley, and after upon a Special Verdict found in the ſaid Suit, Judgment was given in Banco pro prædicta Juliana againſt the ſaid A. upon which Judgment A. bought a Writ of Error in Banco Regis, and a Scire facias is awarded againſt Julian Goddard as a Feme Sole, and ſhe appears by Attorney as a Feme Sole, by the Conſent of her Husband, and after the Judgment * is reverſed, and Judgment was entered Quod prædictus A. recuperet, &c. verſus prædictam Julianam, &c. and Coſts and Damages taxed, &c. upon which Judgment the ſaid A. ſues a Ca. Sa. againſt Julian Goddard, by Force of which Writ the Sheriff takes the ſaid Julian, who is called Doiley, being the Wife of Doiley, yet this is lawful, for the Woman, as long as the Judgment is of Effect, is eſtopped to ſay that her Name is otherwiſe than Julian Goddard, and the Sheriff being the Miniſter to execute the Judgment may take Advantage of this Eſtoppel.

(d) Where married, and the Action brought againſt her as unmarried, &c. vide Title Error, K. pl. 15.

* Fol. 870.

X. pl. 10. and the Notes there, and my firſt Part 708. pl. 4.

B. R. in the (e) ſaid Caſe, per Curiam againſt the Judgment in the Exchequer. Contra H. 7. Jac. Scaccario, between (f) Doiley and Jolliffe held, but adjudged Paſch. 9 Jac. there.

(e) Doiley and White S. C. Cro. Jac. 323. 2 Bulſt. 80.

(f) Lan. 28, 52, 53. S. C. adjudged.

14. Regularly a Stranger ſhall not be bound by, nor take Advantage of an Eſtoppel. *Co. Lit.* 352. *a.*

15. Privies in Blood, as Heirs, Privies in Eſtate, as the Feoffee, Leſſee, *&c.* Privies in Law, as Lords by Eſcheat, Tenant by the Curteſy, Tenant in Dower, the Incumbent of a Benefice, and others that come under by Act in Law or in the *Poſt*, ſhall be bound and take Advantage of Eſtoppels. *Co. Lit.* 352. *a.*

16. Where the Record of the Eſtoppel runs to the Diſability or Legitimation of the Party, there all Strangers ſhall take Benefit of that Record, as (g) Outlawry, Excommengement, (h) Profeſſion, Attainder of *Præmunire*, *&c.* (i) Baſtardy, Mulierty, and ſhall conclude the Party, tho' they be Strangers to the Record. *Co. Lit.* 352. *b.*

(g) Co. Lit. 352. b.
(h) Kelw. 180. a.
(i) Kelw. 180. a.

17. But of a Record concerning the (k) Name of the Perſon, Quality, or Condition, no Stranger ſhall take Advantage, becauſe he ſhall not be bound by it. *Co. Lit.* 352. *b.*

(k) Kelw. 96. a. 180. a.

(M) What ſhall be an Eſtoppel.

(a) Recital.

1. THE (b) Recital of a Deed ſhall never be any Eſtoppel. 9 H. 6. 9. Curia 66.

(a) That it does not conclude, becauſe no direct Affirmation. Co. Lit. 352. b.

(b) In the Original it is Rehearſal.

2. If a Man by Indenture recites, that he had before leaſed for Years to B. now he releaſes to him in Fee, this Deed ſhall eſtop him after to ſay, that he had nothing at the Time of the Making of the Deed, yet it is but Recital. (c) 46 E. 3. 13. (Quære this.)

(c) Br. Eſtoppel 43. S. C. Fitz. 202. S. C. Br. 49. S. C.

3. If Leſſee by Indenture recites, that whereas J. the Heir of B. had granted the Reverſion to C. he attorned to C. this ſhall eſtop him to ſay after, that J. is not Heir of B. (d) 49 E. 3. 14. b.

(d) Fitz. Eſtoppel 207. S. C.

4. In a Deed indented between two Siſters, if one recites, that they are ſeiſed of certain Lands by Force of the firſt Intail, and leaſed her Part for Life, this ſhall not eſtop her to ſay, that ſhe is in by Force of the ſecond Intail. 19 H. 6. 79. dubitatur.

5. If a Man recites by Indenture, that whereas B. holds certain Lands of the Leaſe of his Father, he releaſes in Fee to him; yet he may after ſay, that the Leſſee had no Eſtate upon which the Releaſe could enure, for that it is but Recital. 18 E. 3. 40. 18 Aſſ. (e) 56.

(e) This Number is miſprinted here as in the Original, and I ſuppoſe ſhould be 3. which Caſe vide Br. 127.

6. If a Man by Deed recites, that whereas J. S. held of him certain Lands in D. he acknowledges himſelf to have received 40 s. of the Rent (f) due at Chriſtmas laſt paſt, yet he that made the Acquittance ſhall not be eſtopped to ſay, that J. S. did not hold the ſaid Land of him at the Time of the Acquittance made, for that it is affirmed in the Deed but by Way of Suppoſal. (g) 45 Aſſ. 5. per Curiam.

(f) In the Original it is del Term de Howell.

(g) Br. Eſtoppel 146. S. C.

7. If A. releaſes to B. and the Deed is, that he releaſes to B. in his full Seiſin, yet A. ſhall not be eſtopped by it to ſay, that B. had nothing in the Land at the Time of the Releaſe. (h) 45 Aſſ. 5. per Perſey.

(h) Br. Eſtoppel 146. S. C.

8. If a Man rehearſing in a Deed, that he had made a Leaſe to A. and B. his Wife for Years, he now releaſes to them in Fee, this Deed ſhall not after eſtop him to ſay, that the Husband and Wife had nothing in the Land at the Time of the Releaſe made, becauſe this was only a Rehearſal of the Leaſe for Years. Dubitatur 46 Aſſ. 6.

9. (i) If *A.* leaſes by Indenture to *B.* to begin after the Expiration of a Leaſe to *D.* in Covenant brought by *B.* againſt *A.* he is eſtopped to ſay there is no ſuch *D.* and tho' the common Rule is, that a Recital is not an Eſtoppel, yet (k) where the Recital is material, as here, it is otherwiſe. *Hill.* 20 *Eliz.* 2 *Leon.* 11. adjudged.

(i) 1 Vent. 84. L. P. con. Vaugh. 82. S. P. con.

(k) 1 Leon. 122.

10. (l) If by Indenture between *A.* and *B.* reciting, that *A.* was ſeized in Fee of certain Lands, *A.* in Conſideration of a Marriage to be had between her Son and *B.* grants a Rent out of thoſe Lands to *B.* to begin after the Death of her Son, and covenants to pay it in an Action againſt *A.* upon this Covenant, ſhe cannot plead ſhe had nothing in the

(l) 1 Leon. 122. L. P.

Land at the Time of the Covenant, but that a Stranger was ſeiſed thereof. *Hill.* 23 *Car.* between *Newton* and his Wife, and *Weeks* and his Wife. *All.* 79. adjudged upon Demurrer, both becauſe ſhe is eſtopped by the Deed, and the Covenant extends to it as an Annuity.

11. If *A.* being a Leſſee for Years makes an Under-leaſe to *B.* by Indenture, and *B.* covenants with *A.* to perform all the Covenants in the original Leaſe to be performed by *A.* his Executors, *&c.* in an Action upon this Covenant *B.* will be eſtopped to ſay, (a) there are no Covenants in the original Leaſe. *Hill.* 7 *Georg.* between *Atkinſon* and *Coateſworth*, *Mod. Caſes* 31, 32. *per Curiam.*

(a) 1 Show. 58, 59. vide.

Surplus ſhall not eſtop.

(b) 9. If the Jury upon an Iſſue find a Matter which is but Surplus, of which they needed not to have inquired, this ſhall not eſtop the Party. 11 H. 6. 46.

(b) This comes under Letter M. in Rolle, and the Placita there as here.

10. If the King ſues a Sci. fa. againſt B. as Heir of A. for the Debt of A. if the Defendant ſays, that A. was Tenant by the Curteſy of the Land which was the * Inheritance of C. his Mother, whoſe Heir he is, and it is found by Iſſue accordingly; in another Action B. may well ſay, that he is the Son of D. and ſhall not be eſtopped; for the Effect of the Iſſue was, whether A. was Tenant by the Curteſy or in Fee, and the Addition that he was the Son of C. was Surplus. (c) 46 E. 3. 18.

* Fol. 871.

(c) Br. Eſtoppel 44. S. C.

11. In an Aſſiſe of Common, if the Defendant ſays, that the Land where, &c. is out of his Fee, &c. tho' here this is no Plea to force the Demandant to make a Title in an Aſſiſe; yet if he does make a Title upon a Grant after the Time of Memory, he ſhall be eſtopped after in another Action to claim the Common by Preſcription. 11 H. 6. 27. b.

(d) A Thing not material.

(d) Vide Ray. 457.

(e) Co. Lit. 352. b. S. P.

12. (e) A Thing alledged of Record not material, ſhall not be any Eſtoppel. 13 H. 4. 14.

13. If Leſſee for twenty Years prays in Aid of the Leſſor, as Leſſee for Ten, who joins, and pleads, &c. this ſhall not eſtop the Leſſee to claim for more than ten Years; becauſe the Number of Years was not material, nor traverſable. (f) D. 12 El. 289, 59.

(f) Raym. 457. S. C. cited.

14. But otherwiſe it is if Tenant in Tail prays in Aid as Tenant for Life, for this ſhall eſtop, for here he differs in the Subſtance of the Eſtate. (g) 8 H. 4. 8. b.

(g) Br. Eſtoppel 60. S. C.

A Thing not traverſable.

15. A Man ſhall not be eſtopped by not denying a Thing if he could not have had a Traverſe thereto. 19 H. (h) 1. 79.

(h) This is miſprinted in the Original, as here, and ſhould be 19 H. 6.

A Matter alledged that is not traverſable ſhall not eſtop. *Co. Lit.* 352. *a.*

(N) What Act or (a) Acceptance ſhall be an Eſtoppel.

(a) Regularly a Man ſhall not be concluded by Acceptance, &c. before his Title accrued. Co. Lit. 352. b. Vide my ſecond Part 131. pl. 2.

1. IF Tenant in Fee accepts a Leaſe for Years of the Lands by Deed indented, (b) this will eſtop him during the Term to claim other Eſtate. Co. 4. Lond. 54. (c) 14 H. 6. 22. b. Trin. 3 Jac. B. R. between (d) Style and Herring per Curiam. Co. Lit. 47. b. 3 E. 4. 14. (e) 8 E. 4. 7.

(b) For this vide Godb. 231. Goulſ. 53, 54. 2 Leon. 159. 96, 109, 221. S. C. (c) Fitz. Eſtoppel 32. S. C. Br. Eſtoppel (d) My ſecond Part 234. G. 1, 2. S. C. (e) This is printed here as in the Original, but I ſuppoſe ſhould be 2 Ed. 4. 17.

2. So if Leſſee for Years accepts a Leaſe for Years from a Stranger by Indenture, who had nothing in the Reverſion, this ſhall be between them a Leaſe by Eſtoppel, and not a Confirmation only of the firſt Eſtate. Trin. 3 Jac. B. R. between (f) Stile and Herring, per Curiam præter Fenner, who (g) thought it ſhould be a Confirmation.

(f) My ſecond Part 234. G. 1, 2. S. C. (g) In the Original it is ſemble.

3. If (h) a Man takes a Leaſe for Years of his own Land by the Patent of the King, rendring Rent, this ſhall not eſtop him as an Indenture between common Perſons, becauſe the King cannot be eſtopped by his Patent, and an Eſtoppel ought to be of both Parties. Trin. 8 Jac. Sir Michael Stanhope's Caſe, dubitatur.

(h) Vide poſt under this Title, where Eſtoppels ought to be mutual.

4. If a Man takes a Leaſe for Years of the Herbage of his own Land by Deed indented, this is no Eſtoppel to ſay, that the Leſſor had nothing in the Land, becauſe it is not made of the Land it ſelf. Co. Lit. 47. b.

5. (i) If A. leaſes Lands for Years to B. by Indenture, this ſhall eſtop both Parties to ſay, that the Leſſor had nothing in the Land at the Time of the Leaſe made. Co. Lit. 47. b.

(i) 2 Leon. 159. S. P. per totam Curiam.

6. But if A. leaſes Land for Years to B. by Deed-Poll, B. is not eſtopped to ſay, that A. had nothing in the Land at the Time of the Leaſe made, becauſe it is not mutual. Co. Lit. 47. b.

7. If a Copyholder in Fee comes into the Court of the Lord, and accepts from the Lord a Copy, by which the Lord grants it to him for Life, * the Remainder to his Wife for Life, the Remainder to his Son for Life, this ſhall not eſtop him to claim the Inheritance, for at moſt this ſhall enure but as a Surrender to the Uſes aforeſaid, and then the Reverſion in Fee ſhall continue in his own Perſon. 37 El. B. between (k) Southcot and Adams adjudged, which intratur Hill. 36 El. Rot. 2640. Mich. 13 Ja. B. R. held in the ſame Caſe upon Evidence at the Bar.

* Fol. 872.

(k) 1 Rol. Rep. 256. S. C. 3 Bulſt. 80. S. C.

8. If the Husband had aliened the Wife's Lands in Fee, and took back an Eſtate to himſelf and his Wife for their Lives; tho' the Wife ſhould have been remitted, yet in an Action of Waſte brought againſt them, the Husband would have been eſtopped to ſay ſo. *Lit. Sect.* 666, 667.

9. (l) If a Diſſeiſor by Indenture infeoffs the Diſſeiſee, he will be eſtopped to claim his former Eſtate. *Co. Lit.* 363. *b.*

(l) Kelw. 122. L. P.

(O) In

(O) In what Caſes a Man ſhall be eſtopped in his Name.

1. IF A. Balman binds himſelf in an Obligation by the Name of A. Bawman, he ſhall be eſtopped to ſay that his Name is otherwiſe, and the Action (a) may be brought againſt him by his true Name, ſcilicet Balman, alias dict. Bawman, to agree with the Obligation. Mich. 9 Car. B. R. between Buxton and Balman adjudged.

(a) That it cannot be ſo brought where the Miſtake is in the Chriſtian Name, vide Dyer 279. pl. 9. Cro. El. 897. but ought to be brought according to the Bond. Cro. Jac. 640. and vide Stil. 104. Ow. 48. 2 Brownl. 48. Far. 104.

2. If a Man binds himſelf by a falſe Surname, he ſhall be eſtopped to avoid it, becauſe he may have ſeveral Surnames. (b) 3 H. 6. 25. b.

(b) Br. Eſtoppel 3. S. C.

3. So if a Man binds himſelf by a falſe Chriſtian Name, he ſhall be eſtopped to avoid it. (c) 3 H. 6. 25. b. D. 11 El. 279. 9.

(c) Br. Eſtoppel 3. S. C. but S. P. con.

4. (d) If in an Action upon a Bond againſt one as Executor of *Edm. Shephard*, upon *Oyer* prayed, it appears that the Words are, *Me Edvardum S. teneri, &c.* and that he ſubſcribed it by the Name of *Edm. S.* (which was his true Name) and upon *Non eſt factum teſtatoris* pleaded, it is found to be the Deed of the ſaid *Edm. S.* yet the Plaintiff ſhall not have Judgment, the Truth appearing on the Record, for *Edward* and *Edmund* are two diſtinct Names, and the (e) Subſcription by the Name of *Edm.* being no Part of the Bond, is not material. *Trin.* 20 *Jac.* between (f) *Maby* and *Shephard*, *Cro. Jac.* 640. adjudged.

(d) Dyer 279. pl. 9. L. P. and vide Lutw. 894, 895, &c. Cro. Jac. 558. Moor 897. pl. 1260. 1 Leon. 322.

(e) Where ſuch Subſcription ſupplied a Blank being left for the Chriſtian Name in the Bond. Cro. Jac. 261. (f) Godb. 283, 284. S. C. adjudged.

5. (g) If *A.* gives Bond by the Name of *B.* and is ſued by the Name of *B.* and pleads the *Miſnomer*, the Plaintiff may reply that he made the Bond by the Name of *B.* and eſtop him by demanding Judgment, if againſt his own Deed, he ſhall be admitted to ſay his Name is *A. Mich.* 3 *Ann.* between *Linch* and *Hook*, *Salk.* 7. *per Curiam.*

(g) Dyer 279. pl. 9. S. P. and vide.

(P) A Man ſhall not be eſtopped by a (h) Generalty, otherwiſe by a Particularty.

1. IF a Condition of an Obligation contains a Generalty, a Man ſhall not be concluded to ſay, that there is no ſuch Thing. Co. 2. Doddington 33. b.

(h) For this vide Poph. 114. Cro. El. 362. Moor 405, 420. Ow. 110, 111. Doubty and Fawn, 1 Brownl. 117. Yelv. 226. 2 Bulſt. 19. and vide Latch 125. Cro. Jac. 375. Moor 23. Dal. 28. 1 Show. 59.

2. In Debt upon an Obligation, of which the Condition is, to perform all Agreements now ſet down by J. S. the Defendant may ſay, that no Agreement was then ſet down by J. S. becauſe this comprehends a Generalty. Mich. 14 Jac. B. R. (i) King and Perſeval, per Curiam. My Reports Paſch. 15 Jac. in the ſame Caſe affirmed again per Curiam.

(i) 1 Rol. Rep. 430. S. C. adjudged.

3. (a) If a Condition of an Obligation be to perform all Covenants contained in ſuch Indenture; in Debt upon the Obligation, the Defendant (b) cannot ſay, that (c) there is no ſuch Indenture, becauſe he is eſtopped. My Reports, Trin. 14 Jac. (d) Juel's Caſe adjudged.

(a) Cro. El. 757. S. P.
(b) Smith and Yeomans, 1 Saund. 316. 1 Mod. 15.

(c) But he may ſay there are no Covenants. 1 Mod. 15. —— But then he will confeſs the Obligation to be ſingle, and the Plaintiff upon Demurrer ſhall have Judgment. 1 Lev. 3. adjudged, and vide 1 Lev. 45. Ray. 27.
(d) 1 Roll. Abr. 408. S. C. adjudged.

4. If the Condition of an Obligation be, to ſuffer the Obligee to carry away all ſuch Marle as he of Right ought to have in ſuch a Cloſe; the Obligor ſhall not be eſtopped by this to ſay, that the Obligee had no Right to any Marle in the ſaid Cloſe, becauſe the Condition refers to a Generalty. (e) Hill. 4 Jac. B. R. per Curiam.

(e) Wren and Cecill, N. Dyer 196. Margine S. C.

5. (f) So if the Condition be to releaſe all the Right that he hath in Black-acre, he may ſay that he had no Right in Black-acre, and ſhall not be eſtopped; held in the ſaid Caſe by Tanfield.

(f) Moor 406. L. P. per Popham con. and that he ought to make the Releaſe; but that it would have been otherwiſe, if to make a Feoffment; but by the Reporter, Quære where the Diverſity, and that it ſeemed he could not make a Feoffment to give Poſſeſſion of that which he had not, and vide Ow. 110, 111. Doubty and Neal, 2 Keb. 471. 1 Saund. 215.

6. If Baron and Feme make a Leaſe for Years by Indenture, rendring Rent, and it is covenanted between the Parties; and the ſaid Leſſee covenants, that he will pay a couple of Capons at Chriſtmas to Baron and Feme, and the Heir of the Husband, and alſo will work with them for two Days every Harveſt; the Husband dies, and the Wife brings an Action of Covenant; the Defendant cannot plead, that the Wife at the Time of the Leaſe had nothing, (g) but ſhall be eſtopped by the Indenture. Mich. 40, 41 El. B. R. between Boverton and Evans adjudged.

(g) But vide 1 Rol. Abr. 877. B. 2.

7. If the Condition of an Obligation hath Reference to a Particular to be done, or in which a Generalty is to be done, the Obligor ſhall be eſtopped by it to ſay, that there is no ſuch particular Thing.

8. (h) If the Condition of an Obligation be to pay (i) all ſuch Sums of Money in which T. S. ſtands bound by his Deed obligatory to T. H. of and for the Behoof of the Children of W. S. according to the Will of, &c. he ſhall be eſtopped to ſay, that T. S. never ſtood bound by any Deed * obligatory to T. H. for the Uſe of the Children of W. S. &c. Dyer 3 El. 196, 41. adjudged.

(h) Savil 90. L. P. adjudged.
(i) So if the Condition be
* Fol. 873.

to pay all ſuch Sums which he was bound to pay by his ſeveral Obligations, according to Moor 23. pl. 79. Dal. 28. but M. being general.

9. If the Condition of an Obligation be to releaſe all the Right that he hath for Life in Black-acre, he ſhall be eſtopped to ſay, that he hath not any Right for Life in Black-acre, becauſe this contains a Particular. Hill. 4 Jac. B. R. per Tanfield.

10. If the Condition of an Obligation be to perform certain Things for which he is bound in a certain Recognizance, ſhewing the Certainty thereof; the Obligor ſhall be eſtopped to plead, that he was not bound in any Recognizance, in as much as the Condition had Reference to a Particular. Mich. 12 Jac. B. R. between Fletcher and Farrer adjudged.

11. So the Obligor, in the Caſe aforeſaid, ſhall be eſtopped to plead a ſpecial Plea, by which he owns, that he did acknowledge a Thing in Nature of a Recognizance; but upon the ſpecial Matter it appears to the Court, that it was not any Recognizance in Law; for this amounts but to this, that he was not bound in any

Recognizance. Mich. 12 Jac. B. R. between Fletcher and Farrer adjudged.

12. So if the Condition of an Obligation be to give three Parts of the Goods which his Father deviſed to him; he cannot plead that his Father deviſed no Goods to him, becauſe this is a Particular. Paſch. 8 Jac. B. Malary's Caſe, per Curiam.

13. If A. be bound in an Obligation to B. of which the Condition is, that if the ſaid A. and his Wife do perſonally appear before the Judge or Judges of the Court of the King's Palace of Weſtminſter, at the next Court to anſwer to J. S. in a Plea of Treſpaſs, then the Obligation ſhall be void; it is not any Plea for him to ſay, that he himſelf appeared at the next Court, &c. but that at the Time of Sealing the ſaid Obligation, & continue extunc hucuſq; fuit & adhuc eſt ſolus & innuptus nec ulli fœminæ unquam fuit aut eſt matrimonio Copulatus, for he is eſtopped to ſay, he had not any Wife, in as much as this is a Particular, tho' ſhe was not named, nor was it recited, that he was married. Trin. 23 Car. B. R. between (a) Payne and Shelton, adjudged per Curiam upon a Demurrer. Intratur Hill 22 Car. Rot. 740.

(a) Style 17. S. C. not determined. All. 13. S. C. adjudged.

14. In Debt upon a Bond conditioned to pay (b) all Legacies that *J. S.* had given by his Will, the Defendant ſhall be eſtopped to ſay, that *J. S.* made no Will. *Mich.* 37 & 38 *Eliz.* between *Paramour* and *During*, *Moor* 420. *pl.* 578. adjudged.

(b) Where Condition to give J. S. all the Goods bequeathed to him by his Father, the Defendant ſhall be eſtopped to ſay, he had no Goods bequeathed. Godb. 177.

15. But he may ſay, that *J. S.* did not give any Legacy by his Will. *Mich.* 37 & 38 *Eliz.* in the ſaid Caſe of *Paramoure* and *During*, *per Curiam.*

16. In Debt upon an Obligation, conditioned for Payment of 37 *l.* for Rent reſerved on a Demiſe of Copyhold Lands for forty Years, according to ſuch Articles indented, the Defendant ſhall be eſtopped to ſay, he had nothing in the Lands demiſed. *Mich.* 36 & 37 *Eliz.* between (c) *Stroud* and *Willis*, *Cro. Eliz.* 362. adjudged upon Demurrer, tho' objected, if he had nothing in the Land, then he ought not to be paid the Rent.

(c) Poph. 114. S. C. adjudged, Moor 405. pl. 544. S. C. adjourned, Ow. 110, 111. S. C. N. Dyer 196. Margine S. C. but not S. P.

17. (d) In an Action upon a Bond, conditioned to pay 10 *d.* weekly, for keeping a Baſtard, according to an Order made by the Juſtices, the Defendant is eſtopped to ſay, there is no ſuch Order. Between (e) *Germin* and *Randal*, *Noy* 79. adjudged.

(d) 1 Brownl. 57. L. P. (e) Lat. 125. S. C. adjudged, N. Dyer 196. Margine.

18. In Debt upon a Bond conditioned, that (f) whereas *A.* had commenced ſeveral Suits in the King's Bench againſt *B.* if *B.* ſhould appear and make Anſwer thereto, then, *&c.* the Defendant cannot ſay, that *B.* appeared and was ready to anſwer, but there was no Action there depending againſt him, for he is eſtopped ſo to ſay. *Mich.* 41 & 42 *El.* between (g) *Willoughby* and *Brook*, *Cro. El.* 756. adjudged upon Demurrer.

(f) Where it was recited, that J. S. claimed to have a Leaſe, and the Condition was to ſave harmleſs from all Claims of J. S. the Defendant could not plead J. S. had no Leaſe. 3 Leon. 118. (g) N. Dyer 196. Margine S. C.

19. In Debt upon a Bond conditioned, that whereas the Plaintiff had carried 12000 Billets, for the Defendant, to *D.* if the Defendant ſhould pay the Plaintiff after the Rate of 17 *s. per* 1000, then, *&c.* the Defendant cannot plead, that the Plaintiff did not carry 12000 Billets to *D.* for he is eſtopped to deny it. *Hill.* 23 *Car.* 2. between (h) *Hart* and *Buckminſter*, *All.* 52. adjudged.

(h) Style 103. S. C. adjudged.

The Party himſelf.

(Q) A Man ſhall not be eſtopped to ſay a Thing which ſtands with the Deed, otherwiſe on the contrary.

1. (a) IF a Man be bound by a falſe Surname, as by the Name of J. S. where his Name is J. D. he ſhall be (b) eſtopped to avoid it, becauſe he may be known by ſeveral Surnames. (c) 3 H. 6. 25. b.

(a) Vide ante O. pl. 1, 2. with the Notes there.

(b) In the Original it is, He ſhall not be eſtopped to avoid it, but that ſeems to be a Miſtake in the Print, for vide the Year-Book and Br. Eſtoppel 3.

(c) Br. Eſtoppel 3. S. C.

2. The ſame Law if he be bound by a falſe proper Name, contra (d) 3 H. 6. 25. b.

(d) Br. Eſtoppel 3. S. C.

3. If a Man be bound to J. S. Vicar, he may ſay that the Obligee was a Canon profeſſed, and ſo the Obligation void, and ſhall not be eſtopped; for this ſtands with the Obligation. (e) 3 H. 6. 23. adjudged.

(e) Fitz. Eſtoppel 16. S. C. Br. 2. S. C.

4. So if a Man makes an Obligation to his Wife by a ſtrange Name, he ſhall not be eſtopped to ſay, that ſhe is his Wife in Debt thereupon. (f) 3 H. 6. 23.

(f) Fitz. Eſtoppel 16. S. C.

5. If the Condition of an Obligation made to a Sheriff be for the Appearance of ſeven Perſons in certain, the Obligor ſhall be eſtopped by the Deed to ſay, that he delivered it for the Appearance of two Perſons in certain only. Hill. 11 Jac. B. R. between Corbet and Daye adjudged.

Fol. 874.

6. If the Condition be to deliver up (g) one ſuch Obligation, in which the Obligee is bound, the Obligor is eſtopped to ſay, that he was not bound in the ſaid Obligation. Mich. 11 Car. B. R. between Miller and Grewe adjudged upon a Demurrer. Intratur Paſch. 11 Car. 219.

(g) In the Original it is ſuis un tiel Obligation.

7. If a Man leaſes Land to me by Indenture, and after I enter into this Land by Force of this Leaſe, and J. S. ejects me by an elder Title, upon which I bring a Writ of Covenant againſt my Leſſor, my Leſſor cannot ſay, that I was not in the Land by his Demiſe; for this is directly againſt the Deed by which he had demiſed it to me. Trin. Jac. B. R. between (h) Style and Herring adjudged.

(h) Cro. Jac. 73. S. C. adjudged, My firſt Part 234. pl. 1. S. C.

8. As if a Man leaſes to me by Indenture the Land of J. S. who is then alſo ſeiſed of the ſaid Land, and after I enter upon J. S. who re-enters, upon which I bring a Writ of Covenant; the Leſſor cannot ſay, I was not in the Land of his Demiſe, tho' I was a Diſſeiſor to J. S. by my Entry; for the Leſſor is eſtopped to ſay this, in as much as this was a Leaſe by Eſtoppel againſt him. Trin. 3 Jac. B. R. between (i) Style and Herring adjudged.

(i) Cro. Jac. 73. S. C. My firſt Part 234. pl. 2. S. C.

9. (a) If

(a) Dal. 26. S. P. Moor 20. pl. 69. S. P. Hetl. 91. S. P.

9. (a) If A. leaſes Black-acre (in which he hath nothing, but J. S. is ſeiſed thereof) to B. for Years, by Deed indented, and after A. purchaſes it in Fee, the Leſſor is concluded as well as the Leſſee, to ſay that the Leſſor had nothing in the Land, for this is contrary to the Deed. Co. Lit. 47. b. Lit 58.

(b) March 64. S. C. adjudged, and vide 1 Keb. 876.

10. If A. mortgages Lands to B. in Fee, upon Condition, on Payment of 10 l. to re-enter, and after A. before the Day of Payment, he being in Poſſeſſion, makes a Leaſe for Years by Indenture, and after performs the Condition; this ſhall be a good Leaſe againſt him by Eſtoppel, tho' he had nothing in the Land at the Time of the Demiſe. Mich. 15 Car. B. R. between (b) Omelaughland and Hood, per Curiam, in a Writ of Error upon a Judgment in Ireland adjudged, and the Judgment affirmed accordingly; ſcilicet, that the Feoffee of A. ſhall be eſtopped, which was more ſtrong than A. himſelf; and ſo reſolved a fortiori. Intratur Trin. 14 Car. Rot. 183.

(c) Dyer 244. pl. 60. S. C. 1 Co. 155. S. C. cited.

11. Where an Impropriation was made after the Death of an Incumbent to a Biſhop and his Succeſſors, and the Biſhop demiſed the Parſonage for forty Years, to begin after the Death of the Incumbent, and the Dean and Chapter confirmed it; and the Incumbent died; this demiſe did not conclude, for that it appeared he had nothing in the Impropriation till after the Death of the Incumbent. (c) *Co. Lit.* 352. *b.*

12. If *A.* enters into a Bond to *B.* conditioned, that *A.* ſhall uſe and maintain *C.* his Wife; in an Action upon this Bond, *A.* ſhall not be eſtopped to ſay, that *C.* was married to *D.* (who is yet living) before ſhe married *A.* and ſo *A.* cannot uſe and maintain her as his Wife, for he confeſſes and avoids, becauſe ſhe might notwithſtanding be called in common Speech, or named his Wife in a Writing. *Mich.* 39 & 40 *Eliz.* between *Prat* and *Phanuer*, *per Curiam* ſeems to be reſolved.

13. If in an Action for 5 *l.* by the Leſſor, upon a Covenant to pay ſo for every Acre of Meadow ploughed; he lays the Ploughing of an Acre of Lands called *Lane-Meadows* (there being other Meadow leaſed); the Defendant may plead, that the Lands in the Indenture leaſed there, called *Lane's Meadows*, are not Meadow, but Time out of Mind arable, for tho' all Parties to an Indenture are bound by the Words thereof, yet it muſt be intended of material Words, and not ſuch as are deſcriptive only; and if the Cloſes had been leaſed, as containing 500 Acres, yet the Defendant would not have been eſtopped to ſay, there were not ſo many. *Mich.* 11 G. between *Skipwith* and *Green*, 2 *Mod. Caſ.* 311. adjudged.

(R) Where the Plea ſtands with the Deed, and where not.

(d) But a Man ſhall be eſtopped to ſay, that it was delivered before the Date. Br. Faits 94. 2 Co. 4. b. Comb. 83. (e) Fitz. Iſſue 48. S. C. Br. Traverſe ſans ceo 59. S. C. (f) Fitz. Count 71. S. C.

1. A Man ſhall not be eſtopped to ſay, a Deed was firſt delivered after the Time (d) of the Date, for this ſtands with the Deed. (e) 8 H. 6. 6. b. (f) 21 E. 4. 38. Curia.

2. If a Deed be dated in one Place in certain, he ſhall be eſtopped to ſay, that it was delivered at another Place; for this is contrary to the Deed. 8 H. 6. 6. b.

3. A Man ſhall not be eſtopped by an Intendment in a Record or Specialty. 8 H. 6. 7.

Tho' there be an Intendment contrary.

4. As if a Dean and Chapter make a Deed, and in the Deed it is mentioned, that they made the Deed in domo noſtro capitulari, tho' it ſhall be intended, that it was made in Ely, where their Manſion is; yet it may be averred, that it was made in another Place againſt the Intendment, for it may be their Manſion was there, or that they have a Chapter there. 8 H. 6. 6. b. 7.

5. (a) If one gives an Acquittance (b) under his Hand and Seal for Rent due at a Day, he ſhall be eſtopped thereby to demand Rent due at a Day before. *Mich.* 13 *Car.* 2. between (c) *Palmer* and *Stannage*. *Lev.* 43. *per Curiam.*

(a) Moreton and Hopkins, S. P. Dyer 271. pl. 6. 1 And. 14.

N. Bendl. 186. pl. 228. Moor 87. pl. 219. and vide 3 Co. 65. b.

(b) If not under Hand and Seal, it is no Eſtoppel, but Evidence only. Comb. 59, 60.

(c) 1 Sid. 44. S. C. and S. P. per Curiam, Raym. 21. S. C. and S. P.

6. But yet if one avows for Rent due at a Day, he ſhall not be after be eſtopped (d) to avow for Rent due at a Day after. *Mich.* 13 *Car.* 2. between (e) *Palmer* and *Stannage*. 1 *Lev.* 43. adjudged *per Curiam præter Mallet.*

(d) That he may have Covenant after, vide 1 Keb. 95, &c.

Comb. 59, 60. S. C.

(e) 1 Sid. 44. S. C. and S. P. adjudged, Raym. 21. S. C. adjudged,

(f) Eſtoppel againſt Eſtoppel.

(f) This is printed as in the Original, without any Letter before it.

1. IF a Man in an Action makes Title to a Common by Grant after Time of Memory, and after in another Action between them makes Title by Preſcription, and the other admits it; this laſt Eſtoppel ſhall avoid the firſt * Eſtoppel, ſo that he may make Title to the Common by Preſcription. 11 H. 6. 27. b. 28.

* Fol. 875.

2. (g) An Eſtoppel againſt an Eſtoppel, puts the Matter at large. *Co. Lit.* 352. *b.*

(g) Lit. Rep. 271.

(S) What Act or Thing ſhall be an Eſtoppel againſt an Eſtoppel.

1. IF Jointenancy be pleaded with B. and the other ſays, that he is ſole Tenant by this Traverſe, he hath ouſted himſelf from Eſtopping him to vouch as ſole Tenant. (h) 41 E. 3. 5.

(h) Fitz. Eſtoppel 3. S. C.

2. In Debt, if Payment be alledged at B. according to the Condition, if the Plaintiff rejoins, that he did not pay it there; this gives to the Defendant the Advantage to alledge it in another Place in a new Action, without any Eſtoppel. (i) 3 H. 4. 9.

(i) Br. Eſtoppel 53. S. C. Fitz. 95. S. C.

3. If the Plaintiff pleads, that nothing paſſed by a Deed, and the other maintains that it paſſed; in a new Action the Parties are at large, and the Plaintiff may ſay, that it paſſed. (a) 11 H. 4. 30. Curia.

(a) Fitz. Eſtoppel 99. S. C. Br. 62. S. C.

4. In a Formedon, if the Tenant pleads Jointenancy with a Stranger, and the Demandant ſays he is ſole Tenant, and after the Writ abates; in a new Writ the Tenant may take upon him the ſole Tenancy, and ſhall not be eſtopped, becauſe each is eſtopped againſt the other. (b) 19 H. 6. 62. b.

(b) Br. Eſtoppel 183. S. C.

5. In an Aſſiſe, if the Tenant ſays by Bailiff, that he is not Tenant, upon which they are at iſſue, and the Aſſiſe paſſes againſt him, he may bring an Attaint as Tenant, notwithſtanding his Pleading in the firſt Action; for the other hath affirmed him Tenant by the ſame Record, and ſo Eſtoppel againſt Eſtoppel. (c) 40 Aſſ. 20. adjudged.

(c) Br. Attaint 78. S. C.

6. If Husband and Wife are Tenants in Tail, to them and the Heirs of their two Bodies, Remainder to the Heirs of the Husband, and they having Iſſue, the Husband levies a Fine to *J. S.* and his Heirs, and the Husband dies, and the Wife enters; and after by Indenture between *J. S.* and the Wife, reciting, that ſhe held in Tail, Remainder to *J. S.* and his Heirs; he ratifies and confirms to her all her Eſtate and Title in the Premiſſes, *habend.* to her and the Heirs of her Body, and of her late Husband engendered; tho' the Heir is barred by the Fine, yet he is reſtored to the Eſtate-tail by the Confirmation; for as the Fine was an Eſtoppel to the Heir to claim againſt the Fine; ſo the Indenture is an Eſtoppel to him in Reverſion, to ſay, he ſhall not hold in Tail, and there is an Eſtoppel againſt an Eſtoppel, which ſets the Matter at large. *Paſch.* 11 *Car.* between *Baker* and *Willis*, *Cro. Car.* 476. *per Cro.* Juſtice, tho' no Judgment was given, the Parties after agreeing.

(T) What Perſons may be eſtopped in Reſpect of the Eſtate.

The Iſſue in Tail.

1. IF Tenant in Tail acknowledges a Tenure of the King by Eſtoppel, this ſhall not bind the Iſſue. (d) 1 H. 4. 5.

(d) 1 Rol. Abr. 841. F. 1. S. C.

2. In a Formedon, if a Warranty and Aſſets are pleaded in Bar, and the Demandant ſays he hath not Aſſets, and it is found againſt him, by which he is barred; yet his Iſſue in a new Formedon may deny the Deed, becauſe the Land is intailed. (e) 7 H. 4. 40.

(e) Br. Eſtoppel 57. S. C.

3. In a Præcipe againſt Tenant in Tail, he as Tenant for Life, prays in Aid of a Stranger, who enters the Aid, and bars the Demandant; this ſhall not bind the Iſſue, but he may enter. 8 H. 4. 8. b.

4. But if he had prayed in Aid of the King, the Iſſue ſhould be put to Petition. 8 H. 4. 9.

5. If Tenant in Tail brings a Quod ei deforceat, and claims for Life, the Reverſion to another, and recovers, yet his Iſſue may enter. 8 H. 4. 9.

6. If a Man recovers a Rent againſt Tenant in Tail by Confeſſion, this ſhall not bind the Iſſue. (f) 34 Aſſ. 7.

(f) Br. Confeſſion 29. S. C.

7. (a) If Tenant in Tail in Reverſion or Remainder, expectant upon an Eſtate for Life, ſuffers a Common Recovery, and hath Judgment to recover over in Value; yet his Iſſue ſhall avoid this Recovery, and claiming *per formam doni*, ſhall not be eſtopped thereby. 1 *Co.* 96. *b.*

(a) 3 Co. 6. b. S. P. Moor 255. pl. 402. S. P. and vide 2 Leon. 56, 57. b. 3 Co. 3. b.

(U) What Perſons ſhall be eſtopped in Reſpect of the Eſtate.

He that comes under the Eſtate.

1. If there be a Tenure by Eſtoppel between the Tenant of the Land and me by Homage, his Alienee ſhall be ſubject to this alſo. 11 H. 4. 29.

2. If a Villein brings an Action againſt his Lord, who claims him as regardant to his Manor, and he is found free; if the Lord after aliens the Manor, the Alienee ſhall be eſtopped by this Recovery to claim him for his Villein, becauſe he comes under the Eſtoppel. (b) 9 H. 6. 67. b. Dubitatur.

(b) Fitz Eſtoppel 25. S. C. Br. 7. S. C.

3. If a Man recovers without lawful Title a Rent-charge in an Aſſiſe againſt the Tenant of the Land, whoever comes to his Eſtate after ſhall be eſtopped by this Recovery as well as himſelf ſhall be. 30 E. 3. 21. (c) b.

Fol. 876.

(c) I think this ſhould be a. b.

4. If after a Verdict againſt Iſſue in Tail (who would avoid a Statute acknowledged by his Father) that he is ſeiſed of the Land in Fee; the Iſſue before Judgment makes a Leaſe to another; and after Judgment is given againſt him, tho' the Judgment was after the Making the Leaſe; yet becauſe the Leſſee comes after the Verdict, and ſo under the Eſtoppel, he ſhall be bound by the Eſtoppel. My Reports 14 Jac. between (d) Crawley and Marrow adjudged.

(d) 1 Rol. Rep. 424, 443. S. C. 3 Bulſt. 245. S. C. Bridg. 64. S. C.

5. If A. mortgages Lands in Fee to B. upon Condition to reenter upon Payment of Money; and after, he being in Poſſeſſion, demiſes it by Indenture to C. and after performs the Condition, and makes a Feoffment to D. D. ſhall be bound and eſtopped to avoid the Leaſe as well as A. himſelf, becauſe he claims under A. who was eſtopped. Mich. 15 Car. B. R. between (e) Omelaughland and Hood, adjudged *per Curiam*, in a Writ of Error upon a Judgment in Ireland upon a Special Verdict. Intrat. Trin. 14 Car. Rot. 183.

(e) Ante Q. 10. S. C. March 64. S. C. and vide 1 Keb. 876.

(X) What

(X) What Perſon ſhall be bound by an Eſtoppel.

The Heir.

(a) Godb. 385. (b) Br. Eſtoppel 57. S. C.

1. (a) WHERE the Anceſtor is eſtopped, there his Heir ſhall be eſtopped for Land in Fee. (b) 7 H. 4. 40.

(c) In the Original it is conus.

2. The Heir ſhall not be eſtopped to claim certain Land by an Eſtoppel (c) acknowledged by his Father, (d) where he claims the Land by another Anceſtor. Contra 14 H. 6. 22. b.

(d) Diverſity where the Heir accepts of a Recompence, and the Concluſion thereby, or otherwiſe. 8 Co. 54. b.

3. An Eſtoppel on the Part of the Mother ſhall not bind the Heir when he claims from the Father. *Co. Lit.* 365. *b.*

(e) 8 Co. 53. b. S. P.

4. (e) If Lands are given to the Husband and Wife, and the Heirs of the Husband, and the Husband makes a Gift in Tail, and dies, and the Wife recovers in a *Cui in vita* againſt the Donee, ſuppoſing ſhe had a Fee-ſimple, and makes a Feoffment, and dies, and the Donee dies without Iſſue, and the Iſſue of the Husband and Wife bring a *Formedon* in Reverter againſt the Feoffee, tho' the Mother was eſtopped, and he was Heir to the Eſtoppel; yet for that he claimed the Land (f) as Heir to his Father, he is not eſtopped. *Co. Lit.* 365. *b.*

(f) Where one ſhall not be eſtopped by the Fine of his Grandfather, when he makes his Title as Heir to another, tho' forced to make out the Pedigree thro' his Grandfather. Edwards and Rogers, Cro. Car. 524, 543. 1 Jon. 456, 457. March 94, 95. 1 Vent. 418. cited.

Succeſſor.

(g) This is continued as in Rolle, under Letter X.

(g) 3. If a Prior and Convent bind themſelves by a falſe Name, the Succeſſor ſhall be eſtopped thereby. 11 H. 6. 32.

(h) Eſtoppel per Verdict.

(h) If the Son concludes himſelf by Pleading concerning the Tenure of his Lands, and dies without Iſſue, ſo that his Uncle is his Heir, he ſhall be bound thereby; but if the Uncle dies without Iſſue, ſo that the Lands come to the Father, he ſhall not be bound thereby, becauſe he cannot be Heir to his Father. Co. Lit. 12. a.

(i) 4. A Man ſhall not be eſtopped by a Thing found by Verdict which was not put in Iſſue. 32 Aſſ. 9.

(i) Theſe Placita are continued as in Rolle, under Letter X.

(k) Whether a Verdict in a former Action againſt one of the Plaintiffs, will be an Eſtoppel in an Action by him and another. Vide Show. 28, 29.

5. A Man ſhall not be eſtopped by a Thing found by Verdict, if it was not (k) directly put in Iſſue. 32 Aſſ. 9.

(l) Br. Eſtoppel 140. S. C.

6. If a Man pleads in an Aſſiſe, that J. S. made a Feoffment after the Death of M. by Deed; and the Plaintiff, that he made the Feoffment by Deed in the Life of M. and the Jury find, that he made the Feoffment by Deed in the Life of M. this Verdict ſhall eſtop the Tenant in another Action to ſay, that nothing paſſed by the Deed; for that was put in Iſſue, and not only the Time; for if nothing paſſed by the Deed, it was no Feoffment. Contra (l) 32 Aſſ. 9.

7. In an Aſſiſe, if the Tenant pleads to the Aſſiſe, and puts in Evidence the Deed of Feoffment for the Plaintiff, upon which it is found his Deed; he ſhall not after be received to deny the Deed, for this conduces to the Iſſue, and he may have an Attaint of this. 32 Aſſ. 9.

Eſtoppel by Verdict.

(Y) What Perſons ſhall be eſtopped.

Fol. 877.

1. IN an Aſſiſe againſt Baron and Feme, if they plead that J. S. made a Feoffment in the Life of M. by Deed, upon which they are at Iſſue, and it is found againſt the Tenant; after the Death of the Husband in another Action, the Wife ſhall not be received to ſay, that nothing paſſed by the Deed againſt the Verdict, for this was put in Iſſue; for if nothing paſſed he made no Feoffment. Contra (a) 32 Aſſ. 9.

(a) Br. Eſtoppel 140. S. C.

Eſtoppel by Specialty.

(Z) Who ſhall take Advantage of an Eſtoppel by Specialty.

Stranger.

1. IF a Man grants by Indenture the Wardſhip of the Land of J. S. which he hath for Cauſe of Nurture of him, and names him in it Heir of W. S. J. S. ſhall not eſtop the Grantor by this Indenture, becauſe he is a Stranger to the Deed. 30 E. 3. 21. adjudged.

(A) How long the Eſtoppel ſhall continue.

1. (b) IF a Man leaſes for Years by Indenture to the Tenant of the Land in Fee, this ſhall be no Eſtoppel after the Years expired. Co. 4. Rawlins 53. b. (c) London 54. Co. Lit. 47. b. contra (d) 14 H. 6. 22. b. admit.

(b) 4 Co. 53. b. S. P. per Wray.
(c) James and London S. C.
(d) Br. Eſtoppel

Cro. El. 36. adjudged, Moor 181. pl. 323. adjudged, 1 And. 128. S. C. adjudged. 96, 109, 221. S. C. Fitz. 32. S. C.

2. If a Man leaſes Land by Indenture for Years, which he hath by the Wardſhip of J. S. Son and Heir of W. S. as Guar-

dian in Nurture; after the Term expired he ſhall not be eſtopped to ſay, that he is not the Heir of W. S. 30 E. 3. 21. adjudged.

(a) 13 Co. 62. S. P. 3. (a) Where the Heir was eſtopped as to the Tenure, by ſuing a general Livery; yet upon his Death the Eſtoppel was gone, and ſhould not have concluded the next Heir. 4 *Inſt.* 197.

(B) In what Caſes there ſhall be an Eſtoppel.

Where it paſſes by Way of Intereſt.

1. IF the Tenant of the Land and a Stranger join in a Leaſe for Years by Indenture; this is the Leaſe only of the Tenant, and the Confirmation of the Stranger, and yet the Leaſe as to the Stranger operates by Concluſion. Co. Lit. 45.

2. If Baron and Feme leaſe for Years by Indenture rendring Rent, where the Husband had all the Eſtate in the Land, and the Wife nothing, after the Death of the Husband, the Leſſee in an Action of Debt for the Rent, brought by the Wife, ſhall not be eſtopped to ſay, that at the Time of the Leaſe made the Wife had nothing in the Land; for this ſhall not enure by Way of Eſtoppel, in as much as this enures by Way of Intereſt. Mich. 42, 43 El. B. R. between (b) Brierton and Evans adjudged.

(b) Cro. Eliz. 700, 701. S. C. adjudged, and vide 1 Rol. Abr. 872. pl. 6.

(c) 2 Rol. Abr. 64. G. 2. S. P. 3. (c) If A. be ſeiſed of ten Acres, and B of ten other Acres, and they join in a Leaſe for Years by Indenture, theſe are ſeveral Leaſes, according to their ſeveral Eſtates, and the Indenture ſhall not eſtop him, in as much as it paſſes by Way of Intereſt. Co. Lit. 45.

(d) 2 Rol. Abr. 64. G. 3. S. P. (d) 4. So if two Tenants in Common of Land join in a Leaſe for Years by Indenture, yet theſe are ſeveral Leaſes, and no Eſtoppel for the Cauſe aforeſaid.

Fol. 878.

(e) 2 Rol. Abr. 64. G 4. S. P. (e) 5. But if two Coparceners join in a Leaſe for Years by Indenture; this is but one Leaſe, becauſe they have not ſeveral Freeholds, but ſhall join in an Aſſiſe.

(f) 2 Rol. Abr. 64. G. 5. S. P. 6. (f) If two Jointenants in Fee, or for Life, join in a Leaſe for Years by Indenture, reſerving Rent to one of them, it ſhall enure to him only by Eſtoppel by Force of the Indenture; but otherwiſe it would be, if by Parol or Deed-Poll. Co. Lit. 47.

7. If the Husband conveys Land to the Uſe of himſelf and his Wife, and the Heirs of their Bodies begotten, for the Jointure of the Wife, the Remainder to his right Heirs, and after dies, leaving Iſſue B. and after B. being the Iſſue to whom it ought to deſcend in Tail after the Death of his Mother, and the Reverſion in Fee being deſcended to him, levies a Fine come ceo, &c. to D. in Fee; this ſhall enure by Eſtoppel to bar B. to claim the Intail after the Death of his Mother, and alſo ſhall enure to paſs the Reverſion in Fee to D. ſo that D. may enter on the Wife if ſhe makes any Diſcontinuance againſt the Statute (g) 11 H. 7. Co. (h) Sir George Brown's Caſe adjudged.

(g) For this vide my ſecond Part 580, the Comment upon this Act.

(h) 3 Co. 51. b. S. C. Cro. El. 514. S. C. Moor 455. pl. 624. S. C.

8. (a) If A. Leſſee for the Life of B. leaſes for Years by Indenture, and after purchaſes the Reverſion in Fee, and after B. dies within the Term, A. may avoid this Leaſe, becauſe it takes effect by Way of Intereſt, and is determined by the Death of B. (b) Co. Lit. 47. b.

(a) Dal. 26. L. P. Moor 20. pl. 69. L. P. and vide Moor 127. Hetl. 91. and the Leaſe

(b) Salk. 275. S. C. cited, and the Reaſon ſaid to be, becauſe Tenant for Life had a Freehold, would need no Eſtoppel if the Life endured.

9. If one makes a Leaſe for forty Years, and an Year after, by Indenture, makes another Leaſe for forty Years of the ſame Lands, this is good for thirty-nine Years by Eſtoppel, and for the other Year by paſſing the Intereſt; and this was ſaid to be the Caſe of concurrent Leaſes, which are all of them as to Part good by Eſtoppel. *Gilman* and *Hore*, *Mich.* 4 *Will. & Mar. Salk.* 275. adjudged.

Eſtoppels.

The ſeveral Kinds.

1. THere be three ſeveral Kinds of Eſtoppels, by Matter of Record, by Matter in Writing, and by Matter *in Pais*. *Co. Lit.* 352. *a.*

2. By Matter of Record, *viz.* by Letters Patent, Fine, Recovery, Pleading, Taking of Continuance, Confeſſion, Imparlance, Warrant of Attorney, Admittance. *Co. Lit.* 352. *a.*

3. By Matter in Writing, as by Deed indented, by making an Acquittance by Indenture or Deed-Poll, by Defeaſance by Indenture or Deed-Poll. *Co. Lit.* 352. *a.*

4. By Matter *in Pais*, as by Livery, by Entry, by Acceptance of Rent, by Partition, by Acceptance of an Eſtate. *Co. Lit.* 352. *a.*

Eſtoppels.

(c) How Advantage may be taken thereof.

1. EStoppels which bind the Intereſt of the Land, (d) as taking a Leaſe of a Man's own Land by Deed indented, and the like, (e) being ſpecially found by the Jury, the Court ought to adjudge according to the ſpecial Matter; for tho' Eſtoppels regularly muſt be pleaded and relied upon, with an apt Concluſion, and the Jury is ſworn *ad veritatem dicendam*, yet when they find *veritatem facti*, they purſue well enough their Oath, and the Court ought to adjudge according to Law. *Co. Lit.* 227. *a.*

(c) Where upon Demurrer or not. Hob. 207. 1 Brownl. 51. Style 187. Salk. 2.

(d) Rawlin's Caſe S. P. 4 Co. 52, 53. adjudged, Sutton's Caſe S. P. Cro. El. 140. and Court divided, 1 Leon. 206. Savil 98. Court divided, Ow. 96. James Caſe, Moor 181. Cro. El. 36. Morrice and Iſham, Cro. Car. 109, 110. Hetl. 83. Cart. 155. cited.

(e) That the Jury muſt find ſuch Matter of Eſtoppel on Pain of an Attaint. Pleadal and Pleadal, Moor 96. pl. 238. 2 Leon. 159. Cro. El. 36. cited, 4 Co. 53. cited, Lit. Rep. 271. cited, 273. and vide 1 Leon. 156. 1 And. 118, 119. Dyer 147. pl. 73. 3 Leon. 209. 4 Inſt. 207.

2. If

2. If *A.* as Adminiſtrator of *B.* brings Debt upon a Bond by the Defendant, made to *B.* his Inteſtate, dated 4 *Apr. &c.* and the Defendant pleads, that *B.* died before the Date of the Bond, and ſo it is not his Deed, and thereupon Iſſue is joined; the Jury may find that the Defendant delivered it as his Deed, 1 *Apr. &c.* when *B.* was living, and thereupon the Court may adjudge it to be his Deed; for tho' the Obligee in Pleading cannot alledge the Delivery before the Date, becauſe he is eſtopped to aver againſt any Thing expreſſed in the Deed; yet the Jury cannot be eſtopped, becauſe they are ſworn to ſay the Truth. *Hill.* 26 *Eliz.* (a) *Goddard's* Caſe, 2 *Co.* 4. *b.* adjudged *per totam Cur'*.

(a) 3 Leon. 100. S. C.

(b) 2 Brownl. 149, 150. Palm. 19.

3. (b) But the Jury cannot find any Thing againſt what the Parties have in the Record admitted, tho' the Truth be otherwiſe; for the Court may give Judgment upon what is confeſſed by the Parties, and the Jury are charged only with Things in which they vary. *Hill.* 26 *El.* in *Goddard's* Caſe, 2 *Co.* 4. *b. per Curiam.*

4. If upon a Writ of Error it be aſſigned for Error, that the Plaintiff died before Trial, and Iſſue thereupon taken; the Plaintiff in Error, by his Pleading to the Action, is eſtopped to give in Evidence, that the Plaintiff died before the Action brought. *Comb.* 446. *per Holt* Ch. Juſt. at the Sittings at *Guildhall*, 22 *June* 1697. But the Defendant in Error pleading, *Quod adhuc in plena vita exiſtit, & hoc, &c.* he ſeemed to have let the Plaintiff looſe from the Eſtoppel, and the Evidence was admitted; tho' it might have been otherwiſe, if he had ſaid *abſq; hoc*, that he died between the Action brought and Trial.

Eſtoppel.

(c) Ought to be mutual.

(c) Co. Lit. 352. a.

1. IN Debt by a Man and his Wife for Rent on a Leaſe by Indenture made by her and her former Husband; the Defendant may plead, that the former Husband was ſole ſeiſed, and the Wife had nothing at the Time of the Leaſe, and ſhall not be eſtopped, (d) becauſe an Eſtoppel ought to be mutual, and the Deed of a Feme Covert could not bind her. *Mich.* 41 & 42 *Eliz.* between *Brereton* and *Evans*, *Cro. El.* 700. adjudged.

(d) And therefore if one by Indenture takes a Leaſe of his own Land from an Infant or Feme Covert, it is no Eſtoppel, Cro. El. 37. and vide 1 Rol. Abr. 871. pl. 3.

(a) (b) Eſtray.

(a) What it is. N. Bendl. 19. pl. 27. — And the Reaſon thereof. Godb. 150.

(b) If I take a Stray, and a Stranger takes it from me, I may have an Action againſt him, but the Owner cannot, becauſe by my Taking, the Property was deveſted out of the Owner. 1 Brownl. 236. Winch 68.

(A) What Things.

1. (c) Swans may be taken as ſtrays. (d) 7 H. 6. 27. b.

(c) No Fowl can be Strays but Swans. 4 Inſt. 280.

(d) Br. Eſtray 3. S. C. Fitz. Bar. 6. S. C. 7 Co. 16. b. S. C. cited.

(B) The Goods of (e) whom ſhall be ſaid to be Eſtrays.

(e) Not of one who hath Common in the Place where taken. Br. Eſtray 3. 7 Co. 16. b.

1. If the Goods of the King ſtray into the Manor of a common Perſon, and there remain for an Year and a Day, with Proclamation, &c. yet they are no Strays, for the King ſhall not loſe them. 39 E. 3. 4.

2. So if the Chattel of J. S. ſtray into the Manor of the King, and the King ſeiſes it, and after, before the Year, it ſtrays into the Manor of a common Perſon, and there remains for an Year and a Day after Proclamation, yet this ſhall not bind the King. (f) 39 E. 3. 4. but quære.

(f) Br. Eſtray 4. S. C. Fitz. Eſtray 3. S. C.

3. The Goods of an Infant, Feme Covert, Executrix, Man in Priſon, *&c.* may be Strays, and if proclaimed, *&c.* they ſhall be bound. *5 Co.* 108. *b.*

(C) (g) Proclamation.

(g) How to be made in three Markets adjoining, at three ſeveral Days. N. Bendl. 19.

1. If the next Market-Town be in another County, than where the Stray is ſeiſed, quære, whether the Proclamation ought to be there.

pl. 27. — In reaſonable Time. Winch 68. — In ſuch Proclamation it ought to be ſhewed, whether Horſe, Sheep, &c. and by whom ſeiſed, ſo that the Owner may know where to reſort for his Cattle. Godb. 151. per Daniel. — As to making Proclamation in the Church, vide Brownlow and Lambert, Cro. El. 716. Fitz. Eſtray 3. Br. Eſtray 4.

(D) Eſtray.

1. IF Swans ſtray into my Water, and I ſeiſe them, and a Stranger, * who by Cuſtom hath a Right to put his Swans there, takes theſe Swans of his own Wrong, and after puts them into the Water as his own Swans, and gives Notice, yet I may take them again. 7 H. 6. 28.

* Fol. 879.

2. If the Chattel of J. S. ſtrays into the Manor of the King, and he ſeiſes it, J. S. cannot take it again within the Year, before he hath proved it to be his Chattel. (a) 39 E. 3. 4. ((b) Quære this, for how can he make Proof.)

(a) Fitz. Eſtray 3. S. C. Br. Eſtray 3. S. C.

(b) That the Law takes no Notice of any Proof but by twelve Men. Vide Taylor and James, Godb. 250. and vide 5 Co. 108. a. 27 Hen. 8. cap. 7. —— But in the Caſe of a common Perſon, if the Owner makes any reaſonable Proof, as if he ſhews the Marks, &c. it is ſufficient, and the Party ſuo periculo ought to deliver the Stray, and the Owner cannot be put to his Oath. Godb. 250. Noy 144. But by the Caſe of Henly and Walſh, 1 Salk. 686. the Owner may ſeiſe his Horſe where he finds him, without telling any Marks, or making any Proof of the Property, which may be done upon the Trial.

3. If my Eſtray ſtrays out of my Manor, and goes into another Manor the Day before the Year ended, (c) I cannot enter into the other's Manor to fetch it out. *Trin.* 8 *Jac.* in the Caſe of *Harvy* and *Blackdole*, 1 *Brownl.* 236.

(c) This ſeems to be intended where the other Lord had ſeiſed or claimed it. Winch 68. Hut. 67. 12 Co. 100.

Abuſer.

(d) (E) How the Lord ought to demean himſelf.

(d) This is miſ-printed in the Original, being (C) there.

1. IF an Horſe be taken as a Stray, the Lord who takes him cannot work him within the Year, for within the Year and Day he hath no Property in him. Hill. 4 Jac. B. R. between (e) Bagſhaw and Gallard adjudged.

(e) Bagſhaw and Goward S. C. Cro. Jac. 147, 148. adjudged, tho' it was ſaid to be the common Courſe to uſe ſtray Horſes with Withies about their Necks, but the Court held it to be an Abuſe. Yelv. 96. S. C. adjudged, Noy 119. S. C. adjudged, 12 Co. 100.

2. If a Cow be taken as a Stray, it may be milked within the Year, becauſe ſhe will be the better for that, and it tends to the Preſervation of the Cow; for he that takes a Stray ought to find it Victuals, and to provide that it doth not periſh for Want of good Keeping, (f) but otherwiſe it is of a Diſtreſs. Hill. 4 Jac. B. R. in (f) Bagſhaw and Gallard's Caſe per Curiam.

(f) But for this vide my ſecond Part 648. pl. 8.

(f) Noy 119. S. C. and S. P. and ſaid a Man might ſhear a Stray.

3. It is no good Cuſtom, that when a Stray is taken within the Manor, that the Bailiff ſhall put it in a great Moor, Part of the Manor, for its Suſtenance, and that it ſhall remain there during the Year; and if it be unruly, that it ſhall remain fettered till

till it be gentle. Mich. 8 Jac. B. between (a) Harvy and Blackdon per Curiam.

(a) 1 Brownl. 236. S. C. but S. P. does not appear. Winch 67, 125. S. C. cited to be adjudged, and that the Reaſon given by Coke was, becauſe he ſhould be paid for the Damage he did.

4. But at an Aſſiſes apud Sarum, 1621. between (b) Pledall and Coſmore, in Trover and Converſion, it was ruled upon Evidence, by Tanfield Chief Baron, that if a Stray being a Colt, after Proclamation, be unruly, ſo that it cannot be kept within the Fences, (the Fences being in good Repair) it may be croſs-fettered, and that this is lawful, tho' the Year be not paſſed, in as much as he ought to keep it ſafe, and is anſwerable for it if it be (c) loſt.

(b) Winch 67, 125. ſeems to be S. C. where Winch, Hutton and Harvy, held he might fetter him as his own; but Hobart cont. becauſe he ſhould be paid for the Meat and Damage. Hut. 67. S. C.

(c) In the Original it is perde.

5. If a Stray be ſeiſed, and Proclamation made, the Lord of the Manor (d) may juſtify the Detaining of it till (e) ſufficient Amends made by the Owner for the Paſture during the Time of its being there; and if the Lord requires more for Amends than is reaſonable, yet if the Owner does not tender ſufficient Amends for the Paſture, the Retaining of it is lawful. At the Aſſiſes apud Sarum, 1621. between Pledal and Coſmore, ruled upon Evidence in Trover and Converſion, by Tanfield Chief Baron, then Judge of the Aſſiſes. New Entries 170. a.

(d) Noy 119. Winch 68. but for this vide 2 Rol. Abr. 92. M. 3. and the Notes there.

(e) The Party ought to demand the Amends at his Peril, ſo that the Reaſonableneſs may be adjudged by the Court. Noy 144.

6. If the Bailiff of a Manor ſeiſes a Stray, and proclaims it, he ought not after to deliver it over to another to be kept, till Proof made to whom it belongs, and Satisfaction made for its Meat. *Paſch. 5 Jac.* between (f) *Taylor* and *James*, *Godb.* 150. in Replevin by the Owner, adjudged that the other could not detain him till, *&c.*

(f) Noy 144. S. C. adjudged.

7. A Stray (g) ought to be kept within the Manor where ſeiſed (which may extend into ſeveral Counties) and upon Lands in the Poſſeſſion of the Lord. *Paſch. 5 Jac.* in the Caſe of (h) *Taylor* and *James*, *Godb.* 150. adjudged.

(g) Winch 68.

(h) Noy 144. S. C. adjudged.

Who ſhall have it.

1. If there be two Tenants in common of a Manor to which Strays belong, and a Stray happens, they are Tenants in Common of that; and if one takes it, the other hath no Remedy but to take him again. *Co. Lit.* 200. *a.*

2. But if by Preſcription one is to have the firſt Beaſt happening as a Stray, and the other the Second, an Action lies if one takes that which belongs to the other. *Co. Lit.* 200. *a.*

3. If a Stray happens within the Wife's Manor, and the Husband dies before Seiſure, the Wife ſhall have it, and not the Executors of the Huſband; (i) for the Property was not in the Wife before Seiſure. *Co. Lit.* 351.

(i) That Treſpaſs lies for the Lord before Seiſure, where a Stranger takes the Stray. F. N. B. 91. N. Cro. Jac. 119. — So Trover. 2 Keb. 589.

4. If Leſſee for Life of a Manor ſeiſes a Stray, and dies before the Year and Day paſt, the Executors of the Leſſee ſhall have it, and not he in Reverſion; for tho' the Leſſee had not the abſolute Property in his Life, yet when the Year is expired, the Property ſhall have Relation to the Time of the Seiſure. *Hill.* 4 *Ed.* 6. *Moor* 11. *pl.* 43.

If

5. If one ſeiſes a Stray within his Manor, and proclaims it according to Law, and within the Year and Day lets the Manor, with all Royalties and Liberties, the Leſſor, after the Year and Day, ſhall have it, for the Property relates to the Time of the firſt Seiſure. 12 *Co.* 100. *per Brown* Juſtice, but all the Juſtices were againſt him, becauſe the Property of the Stray was not altered before the Year and Day.

Pleadings in Relation thereto.

1. If one juſtifies the Taking a Mare as a Stray, and does not alledge the Mare came as a Stray, the Plea is not good; in the Caſe of *Harvy* and *Blackdole*, 1 *Brownl.* 236.

2. In a Juſtification for Taking his Horſe, which had been ſeiſed as a Stray, it is ſufficient to ſay, he tendered Amends generally, (a) without expreſſing any certain Sum, for he was no Wrong-doer, and it is impoſſible he ſhould know how long his Horſe had been in the Lord's Cuſtody; but it ſeems he ought to ſhew the Amends tendered was refuſed. *Mich.* 4 *Ann.* between *Henly* and *Walſh*, 2 *Salk.* 686. *per Curiam.*

(a) The Party ought to demand the Amends at his Peril, ſo that the Reaſonableneſs may be adjudged by the Court. Noy 144. —— Iſſue joined upon a Tender of Amends. Co. Entr. 170.

3. If he ſays he demanded the Horſe *proferendo ſatisfactionem*, this is ſufficient, and a direct Affirmation, as in the Caſe of *Warrantizando Vendidit*. *Mich.* 4 *Ann.* between *Henly* and *Walſh*, 2 *Salk.* 686. *per Curiam.*

(a) Eveſque.

Fol. 880.

(a) By the antient Law and Cuſtom of **England**, a Biſhop could not make his Will of his Goods and Chattels coming of his Biſhoprick; and what they agreed to give the King after

(A) (b) What.

1. **IF a Man be elected, and the Temporalties granted to him, yet he is not Biſhop before Conſecration.** 41 E. 3. 6. 46 E. 3. 32. quære, **for he may refuſe to be Biſhop after Election, and before Conſecration, but not after.** (c) 41 E. 3. 5. b.

their Deaths, for Liberty of making their Wills, **vide** 4 Inſt. 338. (b) That a Cathedral Church cannot be without a Biſhop. 2 And. 168. (c) Fitz. Quare Impedit 129. S. C. Br. Preſentment al Egliſe 3. S. C.

2. **A Biſhop elect, before Conſecration, is no Biſhop.** 11 H. 4. 38. b.

3. A Biſhop elect may ſit in Parliament as a Lord thereof. 4 *Inſt.* 47.

4. A Biſhop, after he is choſe (d), *&c.* and before he is conſecrated, (e) may certify an Excommunication, for by his being choſe, the Power of the Guardian of the Spiritualties ceaſes. 8 *Co.* 69. *a.*

(d) **By this, I ſuppoſe, is intended confirmed.**

Palm. 473. (e) **But for what a Biſhop may do before Conſecration, vide the Argument in the Caſe of** Evans & al' **verſus** Aſcuith. Palm. 457, 458, &c. Lat. 31, 233. Noy 93.

5. When a Biſhop is tranſlated, the old See is not void till that Election is confirmed; for tho' he be elected, the King may not conſent, or the Archbiſhop confirm, and he ought not to loſe his old Preferment before the new gained. *Salk.* 136.

6. And in Caſe of a Creation, the old Preferment is not void till Conſecration. *Salk.* 137.

(B) (f) Who may elect.

(f) **Vide** Biſhop of **Oſory's** Caſe. Palm. 22, 23, **&c.** 1 Rol. Rep.

(g) 7. **The Patronage of all Biſhopricks is in the King, tho' he hath given a** Conge **to the Chapters to elect them.** 17 E. 3. 40. b.

101, 102. Cro. Jac. 552, 553. (g) This in **Rolle** is pl. 3. and continued accordingly.

8. (h) **In antient Time the King gave the Biſhopricks.** 17 E. 3. 40. b.

(h) They were donative **per traditionem baculi & annuli.** Co. Lit. 344. a.

9. **And after the King gave a** Conge **to the Chapter to elect them.** 17 E. 3. 40. b.

10. 1 E. 1. Rot. clauſo Memb. 11. in dorſo, **there is ſuch Proteſtation made by the King,** Cum Eccleſia Cathedralis viduatur, & de jure debeat & ſoleat de conſuetudine provideri per electionem canonicam ab ejuſmodi potiſſimum celebrandam Collegiis, capitulis & perſonis, ad quos jus pertinet, petita tamen prius ab illuſtri rege Angliæ ſuper hoc licentia & obtenta; & demum celebrata electione perſona electa eid. regi habeat

 præ-

præſentari, ut idem Rex contra perſonam ipſam poſſit proponere ſi quid rationabile habeat contra eum. And the Proteſtation is further, that if the Pope makes Proviſion, without ſuch canonical Election, the King ſhall not be bound to give him the Temporalties; yet there of Grace, for the Time preſent he gave the Temporalties to the Abbot elect of Canterbury. Vide the like 11 E. 1. Rot. finium M. 5. for the Abbot of Sr. Auguſtine Canterbury, &c. vide this at large.

11. All the Archbiſhops and Biſhops have been founded by the Kings of *England*, and hold of the King *per Baroniam*. *Co. Lit.* 97. *a.* 344. *a.*

12. The Biſhopricks in *Wales* were founded by the Princes of *Wales*, and the Principality of *Wales* was holden of the King of *England* as of his Crown, and when the Prince of *Wales* committed Treaſon, *&c.* the Principality was forfeited, and the Patronages of the Biſhops annexed to the Crown of *England*. *Co. Lit.* 97. *a.* 134. *a.*

13. Heretofore, when Biſhops were to be tranſlated, there was no Election, becauſe they were ſaid to be married to the firſt Church, which Marriage could not be diſſolved but by the Pope's Conſent, which was to be obtained by Petition; and this was ſaid to be by Poſtulation. *Salk.* 137. but *per Curiam*, this was ſaid to be an Uſurpation and againſt Law, and reſtrained by 16 *R.* 2. and 9 *H.* 4. *c.* 8. and Tranſlations always are by Election, and not by (a) Poſtulation.

(a) For this vide 2 Rol. Rep. 454.

(B) Who may elect a Biſhop, and who may be elected.

Who may elect.

1. IN the Time of King John, after the Death of Hubart, Archbiſhop of Canterbury, the Covent elected another without the Licence and Conſent of the King before obtained to elect, as they before had done, but amended this in another Election. Speed 493.

2. The Election of Biſhop by the Dean and Chapter began by the Grant of the King, but the Grant was to elect after Licence obtained, as appears by the Statute of 25 E. 3. Statutum de proviſoribus. Raſtal 325. d.

3. (b) And King John was the firſt that granted it by his Charter, dated 15 Jan. Anno 16. as it appears by Mathew Paris's great Hiſtory 253. Da. 1. Dean and Chapter of Fernes 46. and Præmunire 90.

(b) Co. Lit. 134. a. agrees, and ſays it was after confirmed by ſeveral Acts of Parliament. —— But this Charter of King John did not extend to Ireland, but after the whole Dominion of Ireland (as well concerning the Church as Commonwealth) was eſtabliſhed to be governed by one Law with England, then the Courſe of the Regiſter was changed, and the ſame Courſe taken there as in England. 4 Inſt. 359. 2 Rol. Rep. 102. Palm. 23. —— But in Ireland they are donative by Letters Patent at this Day. 1 Salk. 136. and for this vide the Caſe of Revan Obrian & al' and Knivan, Cro. Jac. 552, 553. where it appears, that by a Statute made in Ireland, 2 Eliz. Power was given to create Biſhops by Patent, without a Conge d'Eſlier. 2 Rol. Rep. 101, 102. Palm. 22, 23. and vide 2 Rol. Rep. 454.

(c) Fitz. Quare Impedit 129. S. C.

Fol. 881.

4. The Pope may elect a Biſhop. (c) 41 E. 3. 5. b. admit 46 E. 3. 32.

5. If a Biſhop be elected, he ought to be confirmed by the Pope. 41 E. 3. 5. b. (quære by whom this Election is).

6. The Chapter is to elect the Biſhop. 11 H. 4. 38. b.

7. Hill. 8 E. 3. B. R. Rot. 23. The Archbiſhop of York ſummonitus per breve de Venire facias ad reſpondendum Domino Regi, for the Conſecration of the Biſhop of Durham, elect Biſhop without the Con-

Conſent of the King, and the Defendant ſays he is a Peer of the Realm, and ought not to be compelled to anſwer per attachiamentum & Diſtrictiones, ideo, &c. to which it is anſwered, quod contemptus exceſſus & tranſgreſſiones prædicti tangunt uſurpationem juris regii contra coronam, per quod prædictum breve de Venire facias fuit inventum per conſilium Regis, quia in novo caſu novum remedium eſt apponendum, dies datus eſt ad audiendum judicium.

8. King William Rufus, after the Death of the Archbiſhop of Canterbury, kept the See without an Archbiſhop for four Years, and (a) divers other Eccleſiaſtical Promotions then vacant, he aſſumed into his own Hands, putting to ſale the free Rights of the Church. Speed 428. b.

(a) For this vide 2 Inſt. 15.

9. But H. 1. made a Law againſt Reſervations of Eccleſiaſtical Poſſeſſions upon Vacancies. Speed 435.

10. (b) The Manner and Order, as well of the Election of Archbiſhops and Biſhops, as of the Confirmation of the Election and Conſecration is enacted and expreſſed in the Statute of 25 *H.* 8. *c.* 20. but by the Statutes of 31 *H.* 8. and 1 *Ed.* 6. they were made donative by the King's Letters Patent, both which Statutes are repealed, and the Statute of 25 *H.* 8. yet remains in full Force and Virtue. *Co. Lit.* 134. *a.*

(b) 12 Co. 7, 8. a notable Caſe to this Purpoſe, and vide 1 Rol. Rep. 92. Palm. 22, 23, &c. 1 Jon. 160. 1 Salk. 136.

11. There are four Things requiſite in making a Biſhop, Election, Confirmation, Conſecration, and Inſtallation. 1 *Salk.* 137.

Biſhop.

(C) How he may be elected.

1. After the Death of a Biſhop, the Pope reſerves to himſelf the Benefice of the Biſhoprick, and gives it to another, this is an Election. (c) 41 E. 3. 5. admitted.

(c) Fitz. Quare Impedit 129. S. C.

2. Licence to chuſe a Biſhop. Rot. Romæ. 15 E. 2. M. 7.

Biſhop, (d) (e) Conſecration.

(D) Creation of him.

Who may do it.

1. The Pope may do it. 46 E. 3. 32.

(d) The Objections againſt the Conſecration of our Biſhops anſwered. 4 Inſt. 321.

(e) Upon a Tranſlation there needs no new Conſecration. 1 Jon. 160. 1 Salk. 136. 2 Rol. Rep. 453. Latch 138.

2. King H. 1. baniſhed Thurſtan, Archbiſhop of York, for five Years, for receiving Conſecration of the Pope, but at laſt received him for the Pleaſure of the Pope, and his Agreement to obſerve the Cuſtoms of the Realm. Speed 440. b. 458. b.

Temporalties.

Temporalties.

(E) What Intereſt the Biſhop hath in the Temporalties before Grant.

1. IF a Biſhop be elected and confirmed, yet the Freehold of the Temporalties is not in him before Reſtoration made to him by the King. 38 E. 3. 30. b.

2. But the Freehold is in the King. 38 E. 3. 30. b.

Fol. 882.

(F) Grant of the Temporalties.

(a) Co. Lit. 97. a. S. P.

1. (a) ALL the Biſhops of Wales are of the Patronage of the King of England, and he is to grant the Temporalties to them, for before the Conqueſt, the Principality of Wales was held of the King of England, and by the Rebellion and Forfeiture of the Prince, the Principality came to the King of England, by which the Biſhoprics were annexed to the Crown. (b) 10 H. 4. 6.

(b) Fitz. Corody 7. S. C.

2. 11 E. 1. Rot. Clauſo, M. 8. Reſtitutio Temporalium Priori de W. per regem qui habet, &c. ratione Cuſtodiæ hæredis, &c. patroni dicti, &c.

At what Time.

3. The King may grant the Temporalties after Election and before Conſecration. (c) 41 E. 3. 5. b. admit.

(c) Fitz. Quare Impedit 129.
S. C. Br. Preſentment al Eſgliſe 3. S. C.

How.

4. The King cannot grant a leſs Eſtate than in Fee by Reſtitution; for if he limits no Eſtate, yet it is good, and the Law ſays it is a Fee; and if he limits that he ſhall have it for Life or Years, this Limitation is void. Da. 1. Dean and Chapter of Ferneſs 45.

(G) Inveſtiture.

1. ANſelmus, Archbiſhop of Canterbury, deprived divers Prelates for receiving Inveſtiture of King H. 1. but after they were reſtored ex gratia (as he pretended) by the Pope, upon Hearing of the Matter. Speed 436. b.

2. The Roman Synod made a Canon, that Inveſtiture belonged to the Pope; but notwithſtanding this, King H. 1. uſed to give Inveſtiture, as he gave it to Ralph, Archbiſhop of Canterbury. Speed 440. b.

(H) How it ought to be.

1. IN the Time of Edward the Confeſſor, the Prelates uſed to receive Inveſtiture of the King, by Donation to them by the King of a Paſtoral Staff and a Ring, as Wolſtan did it. Matthew Paris. And ſo it was uſed in H. I.'s Time. Speed 436. b.

2. (a) Suffragans are inveſted by a Ring only without a Staff, becauſe they are not ſo fully Biſhops as others. Dr. Field 148.

(a) For what Suffragans are vide 2 Inſt. 79.

3. (b) At the firſt all the Biſhopricks in *England* were of the King's Foundation, and donative *per traditionem baculi*, (*id eſt*) the Croſier, which was the Paſtoral Staff & *annuli*, the Ring, whereby he was married to the Church. *Co. Lit.* 344. *a.*

(b) But vide 2 Rol. Rep. 102, 103. that they were choſe by the Clerks and People, and the making them, given to the King by the Counſel of Lateran. Palm. 25. 1 Salk. 136.

(I) Metropolitan.

1. THE Pope would have Thurſtan, Archbiſhop of York, in the Time of H. 1. to be inſtalled (againſt all Right and Cuſtom,) without profeſſing any Subjection to the See of Canterbury. Speed 440. b.

Fol. 883.

(a) What it is, the greater and the Leſſer. Co.Lit.133.b.

(a) Excommunication.

(A) By what Words it may be.

(b) In the Original it is Duiſſoit. (c) 2 Inſt.631.

HENRY II. ordained, that no Biſhop (b) ought to excommunicate any Man holding of the King in Chief, or any other of the Officers of the King, without his Licence. (c) This was one of the Clarendon Laws. Janus Anglorum 93, 52. Speed 457.

In Diſability of Suits.

(B) By whom it may be certified.

(d) Br. Excommengement 2. S. C. Br. Certificate d'Eveſque 1. S. C. Fitz. Excommengement 11. S. C.

1. NO Letters of Excommunication are to be received in Stay of Actions, unleſs under the Seal of the Ordinary. (d) 20 H. 6. 1.

(e) Co. Lit. 134. S. P. for that the Common Law diſallows of all Acts done in Diſability of any Subject by any foreign Power. (f) Br. Excommengement 11. S. C.

2. (e) An Excommunication under the Bull of the Pope ſhall not be received in Stay of Actions. (f) 30 Aſſ. 19. adjudged.

(g) Cawdry's Caſe. 5 Co. 15. a. b. 23. a. b. 26. a. (h) But a Biſhop may certify an Excommunication made by his Commiſſary or Official, for this is the Court of the Biſhop, and the Commiſſary does it in his Right. 8 Co. 169. a. (i) Br. Excommengement 19. S. C. Br. Certificate d'Eveſque 1. S. C. Fitz. Excommengement 11. S. C.

3. (g) Excommunication certified under the Seal of the (h) Commiſſary ſhall not be allowed. (i) 20 H. 6. 1. adjudged.

(k) Trollop's Caſe S. P. 8 Co. 68. Cro. Jac. 212. S. C. but S.P. does not appear.

4. (k) But in antient Time every Official or Commiſſary might certify, but for the Miſchief which enſued thereupon, it was ordained by Parliament, that none ſhould certify Excommunication but the Biſhop only. *Co. Lit.* 134. *a.*

(l) But whether an Excommunication by the Chancellor of Oxford, for not appearing to an Action of Debt in his Court, could be pleaded, being a Spiritual Sentence in a Temporal Cauſe, was doubted, tho' ſaid to be the Cuſtom confirmed by Parliament. 2 Rol. Rep. 487. —— That there cannot be an Excommunication in a Temporal Cauſe, unleſs by Authority of Parliament. 2 Inſt. 527. —— Againſt the Breakers of Magna Charta and Charta de Foreſta, by 25 E. 1. cap. 4. which vide 2 Inſt. 527. —— Againſt the Breakers of the Statute de tallagio non condendo, made 34 E. 1. which vide 2 Inſt. 535.

5. The Chancellors of the Univerſity of *Oxford* or *Cambridge*, (l) may certify an Excommunication, for they do it by the King's Charter. 6 *Co.* 68. *b.*

6. Com-

6. Commiſſioners delegate by the King's Commiſſion upon an Appeal from a Sentence in the Prerogative Court of *Canterbury*, may certify an Excommunication under their Common Seal. *Mich.* 22 & 23 *El. Dyer* 371. *pl.* 4.

7. The High Commiſſioners, by Force of the (a) 1 *Eliz.* and the Letters Patents thereupon grounded, if competent, *viz.* Spiritual Men might have excommunicated, and certified it as well as Commiſſioners delegate. 4 *Inſt.* 327.

(a) The Branch of the Act which gave this Power was repealed by 16 Car. 2. cap. 11.

(C) How the Certificate ought to be made.

1. (b) If the principal Cauſe of the Action, for which the Excommunication was, does not appear in the Certificate, it ſhall not be allowed (it ſeems this is, for that it may appear to the Court, that the Spiritual Court had Juriſdiction of the Cauſe for which he was excommunicated). (c) 14 H. 4. 14. b.

(b) 8 Co. 68. b.

(c) Br. Excommengement 5. S. C. Fitz. 21. S. C.

2. (d) The Certificate ought to be univerſis Eccleſiæ filiis, or to the Juſtices of the Court where the Suit is to be ſtayed. (e) 20 H. 6. 25.

(d) 8 Co. 68. b. S. P.

(e) Br. Excommengement 3. S. C. Fitz. 12. S. C.

3. If the Certificate be to the King in Chancery, this is not ſufficient to ſtay a Suit in Banco. (f) 20 H. 6. 25.

(f) Br. Excommengement 3. S. C. Fitz. 12. S. C.

(g) 4. The Certificate ought to contain the Day of Excommunication, that it may appear to the Court, whether it was before the laſt Continuance, or not; otherwiſe it is not good, for it cannot be helped by Averment. (h) 20 H. 6. 25.

(g) Cro. Jac. 82, 83.

(h) Br. Excommengement 3. S. C. Fitz. 12. S. C.

5. (i) If a (k) Biſhop certifies, that another Biſhop hath certified him, that the Party who is his Dioceſan is excommunicated; this Certificate, upon the Report of another, is not good. *Co. Lit.* 134. *a.*

(i) 8 Co. 68. b. S. P.

(k) In the Biſhop's Certificate it ought to appear he was by him excommunicated. Moor 775.

6. If a Biſhop by his Letters teſtamentary, under his Seal, certifies *quod ſcrutatis Regiſteriis invenitur contineri quod excommunicat. fuit, &c.* this is good, tho' objected it was not poſitive, and only a Relation of what was found in the Regiſter. *Trin.* 24 *Car.* 2. between (l) *Jay* and *Bond.* 1 *Vent.* 222. adjudged.

(l) 3 Keb. 17, 60, 63.

Pleading

Pleading in Stay of the Action.

(D) By whom the Excommunication being made, it ſhall be a Stay of Actions.

1. IF upon a Sentence in the Court of Rome, a Delegacy be made to the Archbiſhop of England, commanding him to execute the Damages recovered; if the Party thereupon be excommunicated by the Archbiſhop, this Excommunication ſhall not be any Diſability of any Suit, for that this is in Effect the Excommunication of the Pope, and the Archbiſhop cannot abſoil him without Satisfaction of the Damages, and ſo the Court hath not any to whom they may write to abſoil him. (a) 14 H. 4. 14.

(a) Br. Excommengement 5. S. C. Fitz. 21. S. C.

Fol. 884.

2. For an Excommunication by the Pope ſhall not be any Diſability of any Suit, becauſe the Court cannot write to him to abſoil him, if the Cauſe does not belong to him. 14 H. 4. 14.

3. A Man ſhall not be diſabled by any Excommunication, unleſs it be made by ſome Biſhop who is within the Realm, to whom the Court (b) may write to abſoil the Party, if there be Cauſe. 14 H. (c) 6. 14. b.

(b) 2 Inſt. 623.

(c) This is miſprinted here as in the Original, and ſhould be 4. which vide Br. Excommengement 5. Fitz. 21. Co. Lit. 134. a.

4. If the Pope certifies an Excommunication, this is not ſufficient, becauſe the Court cannot write to him if there be Cauſe. (d) 8 H. 6. 3.

(d) Br. Excommengement 7. S. C.

5. A Certificate from the (e) Archdeacon is ſufficient by Cuſtom. Contra 8 H. 6. (f) 13.

(e) Where he hath ordinary Juriſdiction, and is the immediate Officer of the Court, as the Archdeacon of Richmond. Co. Lit. 134. (f) This is miſ-printed here as in the Original, and ſhould be 3. which vide Br. Excommengement 7. Br. Certificate d'Eveſque 26.

6. None can certify Excommunication but only the Biſhop, unleſs he be (g) beyond Sea, or *in remotis*, or one that hath ordinary Juriſdiction, and is the immediate Officer of the King's Court. *Co. Lit.* 134. *a.*

(g) And in ſuch Caſe the Vicar General may certify, but the Court will be appriſed thereof by Matter of Record, viz. by a Writ out of Chancery to them directed, and not by the Surmiſe of the Party only. 8 Co. 69. a.

7. If the Biſhop certifies the Excommunication under Seal, (h) tho' he dies, yet the Certificate ſhall ſerve. *Co. Lit.* 134. *a.*

(h) But if he dies before it is received, it is worth nothing, but his Succeſſor ought to certify. 8 Co. 69. a.

8. (i) When the Plea of Excommunication is allowed, the Writ ſhall not abate, but the Entry is, *quod remaneat loquela ſine die quouſque, &c.* 8 *Co.* 69. *a.*

(i) Lit. Sect. 201.

(E) (a) (b) Excommunicato capiendo.

1. **UPON an** Excommunicato capiendo, **if it appears the Excommunication was by an Archdeacon of a certain Place, it ought to appear expreſly or impliedly in the Certificate, that the Matter, for which the Excommunication was had, was within his Juriſdiction, otherwiſe it is not good. By Reports** 14. Ja. (c) Starling's **Caſe.**

(a) The Spiritual Court are not to meddle with the Perſon of any Man, or to ſend Proceſs before them, but if excommunicated, and continues in Contumacy forty Days, to certify, &c. Smith and Smith, Cro. El. 741. —— So it was in Caſe of the High Commiſſioners. Cro. El. 741. Cro. Car. 582. (b) F. N. B. 62. N. (c) 1 Rol. Rep. 434. S. C.

2. If the *Significavit* does not mention, (d) That he was commorant in the Dioceſe of the Biſhop when excommunicated, the Party ſhall be diſcharged. *Mich.* 39 & 40 *El. Beamont's* Caſe, *Moor* 467. *pl.* 667. adjudged.

(d) But vide 2 Jon. 89. 2 Show. 17. Lat. 174. Godb. 191.

3. By the (e) Statute (f) 5 *Eliz. cap.* 23. reciting, that great Offenders had gone unpuniſhed for Want of good Execution of the Writ of *Excommunicato capiendo*, the great Abuſe whereof was, for that (g) it was not returnable in any Court, who might judge of the Execution and Service thereof, it is enacted, that (h) every Writ of *Excommunicato capiendo* ſhall iſſue in Term-time, returnable in *B. R.* the next Term after the Teſte, having 20 Days between the Teſte and Return, and after ſealed, ſhall be brought in *B. R.* and there (i) opened and (k) delivered of Record to the Sheriff, or other Officer to whom the Execution appertains; and then if not duly returned, or there be any Fault in the Execution thereof, the Court ſhall amerce the Sheriff, or, *&c.*

(e) An Excommunicato capiendo lies, tho' not for any of the Cauſes mentioned in this Act, for it takes not away the Excommunicato capiendo at Common Law, but gives it a greater Force in ſome Caſes. 1 Sid. 181. per Windham. (f) Cro. El. 144. In the Caſe of Garret and Fulwood, it was held per Cur', that this Statute is to be intended not only of Excommunication for Criminal Cauſes, but in any other Suits for Legacies, Probate of Wills, Tithes, &c. —— But in theſe laſt Caſes there ſhall be no Proclamations with Penalties. 2 Inſt. 661. (g) 3 Bulſt. 92. per Coke. (h) The Writ being returned in B. R. tho' for none of the Cauſes mentioned in this Statute, yet the Proceſs thereupon ſhall ever after iſſue thence, and there ſhall be no Reſort to Chancery for a new Writ. 1 Rol. Rep. 174. per Coke. (i) It is enrolled there before it goes to the Sheriff. Salk. 294. (k) The Party upon an Habeas Corpus diſcharged, Pleading, that it was not delivered. Cro. Jac. 567. Cro. Car. 583. 1 Sid. 285. 1 Vent. 309. — Whether it might be done upon Motion without any Plea. 1 Vent. 338. is doubted, and ſaid the Courſe had been both Ways, and vide 1 Sid. 165. 1 Keb. 613, 632. 2 Keb. 31, 300, 854.

4. But at the Return of the Writ, the Sheriff, or, *&c.* ſhall not be compelled (l) to bring the Body into Court, but return the Writ with a ſhort Declaration, how, and in what Manner executed, (m) ſo that the (n) Juſtices may proceed (o) according to the Tenor of the Act.

(l) The Party cannot come into Court but by Habeas Corpus, and if brought in before the Excommunicato capiendo is returnable, he ſhall not be allowed to move to quaſh the Writ. Biſhop of St. David's Caſe. Salk. 294. Far. 56, 58, 59. and vide 1 Sid. 181. (m) A Non eſt inventus being returned upon an Excommunicato capiendo, and the Party being in the Marſhal's Cuſtody, it was moved, that he might be charged with one there, which the Court would not grant, becauſe he had no Day in Court by the Writ; tho' Holt agreed, if he was firſt taken, and then brought here by Habeas Corpus to anſwer an Action, then he might be turned over to the Marſhal, and charged with the Excommunicato capiendo, for there was a Proceſs out of the Court which gave him a Day, as the Excommunicato capiendo did not. Far. 114, 115. (n) The Power, which the Chancery before had, is by the Act given to B. R. Far. 117. (o) Before this Act an Excommunicate could not be diſcharged in B. R. unleſs ſo pending a Prohibition, but now that Court may quaſh the Writ of Excommunicato capiendo, or award a Superſedeas, becauſe they are Judges of the Cauſe, and have it before them. King and Fouler, Salk. 297. and there ſaid the Party could not go into Chancery for a Superſedeas. —— If by the Recital of the Significavit it appears there was no Cauſe for the Writ, the King's Bench may quaſh it, but not the Chancery, tho' the Significavit be there. Biſhop of St. David's Caſe, Salk. 294. Far. 58, 60, 118. —— But vide 1 Vern. 24. where a Superſedeas was awarded in Chancery, it being alledged that an Appeal was brought, and Security given to proſecute it with Effect, the Lord Chancellor ſaying an Appeal was a Superſedeas of it ſelf. —— But by Moor 849. pl. 1155. tho' an Appeal ſuſpends the Sentence on which the Excommunication was had, yet it does not ſuſpend the Excommunication. 1 Rol. Rep. 378.

5. And by the ſame Statute, if a *Non eſt inventus* is returned, a *Capias* ſhall iſſue out of the King's Bench, returnable there in Term-time, two Months at leaſt after the Teſte, with Proclamation to be made at the County-Court, Aſſiſe, and Gaol-delivery, or Seſſions, at leaſt ten Days before the Return, that the Party yield his Body to the Gaol of the Sheriff, or, *&c.* and there remain as a Priſoner, according to the Tenor of the firſt Writ, on Pain of 10 *l.* and if upon the Return thereof it appear the Party hath not rendered his Body accordingly, then another *Capias*, with a Proclamation, as before, ſhall iſſue, with a farther Penalty of 20 *l.* and if upon the Return thereof, it ſhall appear he hath not rendered himſelf, then another *Capias* with like Proclamation and Pain ſhall iſſue, and ſo infinitely until he renders himſelf a Priſoner, which Pains ſhall be eſtreated, as by the Act is directed.

(a) 2 Mod. 13. 6. (a) By the ſame Statute in *Wales*, the Counties Palatine, *&c.* where the King's Writ runs not, the Tenor of a *Significavit* (being on Record in Chancery) ſhall be ſent by *Mittimus* to the Head Officers there, within whoſe Juriſdiction the Party ſhall be reſiant, who ſhall then proceed againſt the Excommunicate as the King's Bench is above directed.

(b) 3 Mod. 42, 43. Skin. 177. 7. And by the ſame Statute if in the *Excommunicato capiendo*, the Party hath not an (b) Addition, according to the Statute of *H.* 5. in certain Caſes thereby provided, or if in the *Significavit* it be not contained, that the Excommunication was upon ſome Cauſe, or Contempt of ſome original Matter of Hereſy, or refuſing to have his Child baptiſed, or to receive the Communion, or (c) to come to Divine Service, or Error in Matter of Religion, or Doctrine received in the Church of *England*, Uſury, Simony, Perjury in the Eccleſiaſtical Court, or Idolatry, then (d) the Pains limited by Reaſon of ſuch *Excommunicato capiendo* wanting ſufficient Addition, or of ſuch *Significavit* wanting all the ſaid Cauſes, ſhall be void, and (e) by Plea allowed to the Party grieved.

(c) Where one Excommunicate for not going to his Pariſh-Church, may, to avoid the Penalties of this Act, plead, that he heard Divine Service in another Church, &c. The King and Barns, 3 Mod. 42. Skin. 176, 177. (d) Upon ſuch Plea the Penalties will be diſcharged, but not the Impriſonment. Hughs and Bendy, 1 Jon. 226. adjudged, Cro. Car. 197. adjudged, and vide 2 Jon. 89. 1 Show. 16, 17. 3 Mod. 89. Queen and Sangway, Salk. 294. Far. 82, 83. tho' ſaid the Law was formerly taken to be otherwiſe. (e) It cannot be avoided otherwiſe than by Plea. Brown's Caſe, Latch 174. adjudged, Cro. Car. 197. cited, and vide 1 Rol. Rep. 174. Far. 83. 12 Co. 76. 3 Mod. 43.

8. And if the Addition be with a *Nuper* of a Place, then upon the Award of a *Capias* with Proclamation, as aforeſaid, one Writ of Proclamation, without any Pain, ſhall be awarded into the County where the Offender ſhall be moſt commonly reſiant, at the Time of Awarding the firſt *Capias* with Pain, and returnable with the ſame *Capias*; and if ſuch Proclamation be not made in the County where the Offender ſhall be moſt commonly reſiant, in Caſe of ſuch Addition of *Nuper* he ſhall incur no Penalty, for not yielding his Body, according to the Tenor aforeſaid.

(e) Plea thereof.

(e) Where in ſuch Plea the Day of the Excommunication ought to have been ſhewed. Cro. Jac. 82, 83. — Where the Entry was, that the Defendant Venit & dicit, &c. 1 Vent. 222. Hales doubted, whether ſome Kind of Defence ought not to have been made, tho' full Defence need not.

1. IF in Pleading thereof the Defendant *protulit hic in Cur. literas teſtamentarias Epiſcopi S. quæ notum faciunt univerſis quod Scrutatis Regiſteriis invenitur contineri quod excommunicat. fuit, &c. pro contumacia* in not appearing to a Suit for Tithes, *&c.* it is good, for it is their Courſe ſometimes to certify *Excommunicat' ſub ſigillo ordinarii*, and ſometimes *per*

literas teſtamentarias, as here. *Trin.* 24 *Car.* 2. between (a) *Jay* and *Bond*, 1 *Vent.* 222. adjudged. (a) 3 Keb. 17, 60, 63.

2. An Excommunication is not to be pleaded in Abatement by *Petit judicium de brevi*, becauſe the Writ is not thereby to be abated, but ſuſpended; and the Pleading (b) ought to be *ſuſpenderi non debet*. *Mich.* 36 *Car.* 2. between Lord *Sturton* and *Pierpoint*, 3 *Lev.* 208. adjudged. (b) That the Plea ought to conclude quod loquela remaneat ſine die quouſq; &c. Lutw. 19, and vide 8 Co. 69. a.

3. If one pleads an Excommunication by Judges delegate, and ſhews the Writ of *Excommunicato capiendo*, with a *Profert in Cur.* thereof, this Plea is not good, becauſe no Certificate of the ſaid Judges delegate was produced. *Trin.* 2 *Jac.* 2. *Lutw.* 17, *&c.* adjudged.

When, and againſt whom it may be pleaded.

1. IF Bailiffs and Commonalty, or other Corporation aggregate of many, bring an Action, Excommunication in the Bailiffs ſhall not diſable them, for that they ſue and anſwer by Attorney. *Co. Lit.* 134. *a.*

2. But if Executors or Adminiſtrators be excommunicated, (c) they may be diſabled, becauſe they which converſe with a Perſon excommunicate, are excommunicate alſo. *Co. Lit.* 134. *a.* (c) So if one of them only be excommunicate. 3 Lev. 208.

3. If a Biſhop be Defendant, he ſhall not plead an Excommunication (d) by the ſame Biſhop, (I ſuppoſe it's meant by himſelf) and it ſhall be intended for the ſame Cauſe, if another be not ſhewed. *Co. Lit.* 134. (d) Or by his Commiſſary (who is as his Deputy) tho' it be for another Cauſe than is then in Queſtion. 8 Co. 68.

4. If the Defendant pleads, that the Plaintiff is *ipſo facto* excommunicated by 5 *Edw.* 6. *cap.* 4. for that he had ſtricken in a Church-yard, without ſhewing any Excommunication by the Ordinary, or under his Seal, (e) this is naught, for the Statute muſt be intended, (f) after a Sentence declaratory, or Conviction; for otherwiſe there would be no Means for an Abſolution. *Hill.* 45 *El.* between *Sonham* and *Trundle*, *Cro. El.* 919. adjudged. (e) Viner and Eaton, Hetl. 86. Lit. Rep. 149. and vide Dyer 275. pl. 48.

(f) That this Statute takes away the Neceſſity of any Sentence of Excommunication, yet he that ſtrikes does not ſtand excommunicated till he be thereof convicted at Law, and this tranſmitted to the Ordinary. 1 Vent. 146. —— That it ſhall be intended after Sentence, or due Trial and Conviction. Vide Cro. El. 680.

Where the Cauſe ought to appear.

1. IF by the *Significavit* it appears one was excommunicated for not anſwering Articles, and it does not appear what they were, it is not good. *Hill.* 12 *Jac.* (g) *Fox's* Caſe, 1 *Rol. Rep.* 136. adjudged. (g) 2 Jon. 89. S. C. cited.

2. At Common Law the Writ of *Excommunicato capiendo* was always general, (h) *pro contumacia*, not containing any Special Matter, and returnable in Chancery, and founded on the Biſhop's Certificate, (i) which ſet forth the Cauſe; and for the Inſufficiency of the Writ, the Party could not be diſcharged, but by *Superſedeas* in Chancery. *Mich.* 12 *Will.* between (k) *The King* and *Fowler*, *Salk.* 293. *per Curiam.* (h) Far. 58, 59. (i) 2 Inſt. 623. 8 Co. 68. b. (k) Far. 58. S. C. cited.

3. But

3. But now the Cauſe muſt be ſet forth in the Writ, becauſe by the Statute 5 *Eliz.* it is returnable in *B. R.* which would be to no Purpoſe, if the Cauſe was not ſet forth in the Writ, ſo that the Court might judge of the Cauſe. *Mich.* 12 *Will.* between *The* (a) *King* and *Fowler per Curiam.*

(a) Far. 58. S. C. cited, 117. S. C. cited.

4. If it be ſet forth in the Writ, that the Excommunication was *pro quibuſdam cauſis ſubſtraction. Decimarum ſive aliorum jurium Eccleſiaſticorum*, this is uncertain and inſufficient, for the *alia jura* may be ſuch Matters as are out of their Juriſdiction, of which the King's Courts are to be judges, and not themſelves. *Mich.* 12 *Will.* between (b) *King* and *Fowler* adjudged, upon the Return of an *Habeas Corpus*, the Writ being quaſhed and Party diſcharged.

(b) Far. 57. S. C. cited by Holt.

5. So where in the Recital of the *Significavit* in the Writ of *Excommunicato capiendo*, it was for not paying the Coſts *in quodam negotio puerorum education' ſive inſtruction' ſine aliqua licentia in ea parte prius obtenta*; the Writ was quaſhed for Uncertainty, becauſe it might be a Teaching to fence or dance, and not Letters. *Paſch.* 13 *Will.* between (c) *The Queen* and *Hill*, 1 *Salk.* 294.

(c) Far. 58. S. C. cited.

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(d) The Biſhop's Authority is ſaved by 5 Eliz. c. 23.

1. BY the Statute of (f) *Articuli Cleri*, made 9 *Edw.* 2. the King's Letters, that the Ordinary ſhall abſolve Perſons excommunicated by a certain Day, ſhall not iſſue, unleſs it be found, that the King's Liberty is prejudiced by ſuch Excommunication.

(e) It muſt be by the ſame Biſhop that excommunicated him, unleſs it be upon an Appeal. Moor 775. Cro. Jac. 83. —— Who may do it out of his Dioceſe. Lat. 174. per Whitlock. (f) It is ſaid there was a Miſtake in this Article, for that no ſuch Writ was ever granted but where a Man was juſtly excommunicated, and taken upon an Excommunicato capiendo, and upon the King's Writ de cautione admittendo, &c. not delivered, for then a Writ iſſued out of Chancery to deliver him. 2 Inſt. 623. F. N. B. 63. C. —— Or if the Excommunication was unjuſt, as if for a Matter not of Eccleſiaſtical Cogniſance, for then the Party had a Writ out of Chancery to the Sheriff to deliver him. 2 Inſt. 623. 12 Co. 76. —— That he may have an Action upon the Caſe. 12 Co. 76. 2 Inſt. 623. —— Or the Biſhop may be indicted. 2 Inſt. 623. —— So if an Excommunicate offers to perform the Sentence, and the Biſhop refuſes to accept it, and abſoil him, he may have a Writ to the Biſhop, requiring him, upon Performance of the Sentence, to abſoil him. 2 Inſt. 623.

2. If one be excommunicated for not obeying a Sentence in the Eccleſiaſtical Court; and upon this Sentence appeals to Delegates, and is remitted to the firſt Court, who Sentence him again, and there he is excommunicated for Non-performance of that Sentence and upon the laſt Excommunication he appeals to the Audience, and then hath Abſolution; this Abſolution for the laſt does not purge the firſt Excommunication, and the Church was deceived in abſolving the laſt when the firſt was in Force. *Paſch.* 14 *Jac.* between (g) *Powel* and *Herman*, *Moor* 849. *pl.* 1155. adjudged.

(g) Harman and Powel, 1 Rol. Rep. 377. S. C. adjudged, by which Report it appears the Abſolution was Special, viz. as to this Excommunication, and not general, that he ſhould be received in gremium Eccleſiæ.

Cautione admittenda.

1. (a) IF the Excommunicate being taken and impriſoned (b) offers ſufficient Caution or (c) Surety, to ſtand to and obey the Ordinances and Rules of the Holy Church, and the Judges there, and Ordinary, refuſe to take ſuch Caution or Surety, then he may ſue this Writ to the Biſhop to admit his (d) Caution. *F. N. B.* 63. C. the Form of which *vide* there.

(a) 2 Inſt. 623.
(b) The Party muſt tender it, for the Judge is not bound to require it. Raym. 226.

(c) By 1 Bulſt. 122. they cannot take a Bond; but quære, and vide the Caſe of Biſhop of Exeter, &c. and Starr, 2 Lev. 36. Ray. 225, 226. 2 Keb. 814, 836, 848, 873. 3 Keb. 219. 1 Vent. 166. and vide 6 Mod. 71. —— And if taken, how, and to whom it ought to be made, vide in the Caſe of the Biſhop of Exeter and Starr, 2 Lev. 36. Raym. 225. 2 Keb. 814, &c. (d) How ſuch Caution may be taken, and the ſeveral Ways of taking it, vide F. N. B. 63. H. Raym. 226. 2 Lev. 36.

3. But now the Cauſe muſt be ſet forth in the Writ, becauſe by the Statute 5 *Eliz.* it is returnable in *B. R.* which would be to no Purpoſe, if the Cauſe was not ſet forth in the Writ, ſo that the Court might judge of the Cauſe. *Mich.* 12 *Will.* between *The* (a) *King* and *Fowler per Curiam.*

(a) Far. 58. S. C. cited, 117. S. C. cited.

4. If it be ſet forth in the Writ, that the Excommunication was *pro quibuſdam cauſis ſubſtraction. Decimarum ſive aliorum jurium Eccleſiaſticorum*, this is uncertain and inſufficient, for the *alia jura* may be ſuch Matters as are out of their Juriſdiction, of which the King's Courts are to be judges, and not themſelves. *Mich.* 12 *Will.* between (b) *King* and *Fowler* adjudged, upon the Return of an *Habeas Corpus*, the Writ being quaſhed and Party diſcharged.

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5. So where in the Recital of the *Significavit* in the Writ of *Excommunicato capiendo*, it was for not paying the Coſts *in quodam negotio puerorum education' ſive inſtruction' ſine aliqua licentia in ea parte prius obtenta*; the Writ was quaſhed for Uncertainty, becauſe it might be a Teaching to fence or dance, and not Letters. *Paſch.* 13 *Will.* between (c) *The Queen* and *Hill*, 1 *Salk.* 294.

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1. BY the Statute of (f) *Articuli Cleri*, made 9 *Edw.* 2. the King's Letters, that the Ordinary ſhall abſolve Perſons excommunicated by a certain Day, ſhall not iſſue, unleſs it be found, that the King's Liberty is prejudiced by ſuch Excommunication.

(d) The Biſhop's Authority is ſaved by 5 Eliz. c. 23.

(e) It muſt be by the ſame Biſhop that excommunicated him, unleſs it be upon an Appeal. Moor 775. Cro. Jac. 83. —— Who may do it out of his Dioceſe. Lat. 174. per Whitlock. (f) It is ſaid there was a Miſtake in this Article, for that no ſuch Writ was ever granted but where a Man was juſtly excommunicated, and taken upon an Excommunicato capiendo, and upon the King's Writ de cautione admittendo, &c. not delivered, for then a Writ iſſued out of Chancery to deliver him. 2 Inſt. 623. F. N. B. 63. C. —— Or if the Excommunication was unjuſt, as if for a Matter not of Eccleſiaſtical Cogniſance, for then the Party had a Writ out of Chancery to the Sheriff to deliver him. 2 Inſt. 623. 12 Co. 76. —— That he may have an Action upon the Caſe. 12 Co. 76. 2 Inſt. 623. —— Or the Biſhop may be indicted. 2 Inſt. 623. —— So if an Excommunicate offers to perform the Sentence, and the Biſhop refuſes to accept it, and abſoil him, he may have a Writ to the Biſhop, requiring him, upon Performance of the Sentence, to abſoil him. 2 Inſt. 623.

2. If one be excommunicated for not obeying a Sentence in the Eccleſiaſtical Court; and upon this Sentence appeals to Delegates, and is remitted to the firſt Court, who Sentence him again, and there he is excommunicated for Non-performance of that Sentence and upon the laſt Excommunication he appeals to the Audience, and then hath Abſolution; this Abſolution for the laſt does not purge the firſt Excommunication, and the Church was deceived in abſolving the laſt when the firſt was in Force. *Paſch.* 14 *Jac.* between (g) *Powel* and *Herman*, *Moor* 849. *pl.* 1155. adjudged.

(g) Harman and Powel, 1 Rol. Rep. 377. S. C. adjudged, by which Report it appears the Abſolution was Special, viz. as to this Excommunication, and not general, that he ſhould be received in gremium Eccleſiæ.

Cautione admittenda.

1. (a) IF the Excommunicate being taken and impriſoned (b) offers ſufficient Caution or (c) Surety, to ſtand to and obey the Ordinances and Rules of the Holy Church, and the Judges there, and Ordinary, refuſe to take ſuch Caution or Surety, then he may ſue this Writ to the Biſhop to admit his (d) Caution. *F. N. B.* 63. C. the Form of which *vide* there.

(a) 2 Inſt. 623.

(b) The Party muſt tender it, for the Judge is not bound to require it. Raym. 226.

(c) By 1 Bulſt. 122. they cannot take a Bond; but quære, and vide the Caſe of Biſhop of Exeter, &c. and Starr, 2 Lev. 36. Ray. 225, 226. 2 Keb. 814, 836, 848, 873. 3 Keb. 219. 1 Vent. 166. and vide 6 Mod. 71. —— And if taken, how, and to whom it ought to be made, vide in the Caſe of the Biſhop of Exeter and Starr, 2 Lev. 36. Raym. 225. 2 Keb. 814, &c. (d) How ſuch Caution may be taken, and the ſeveral Ways of taking it, vide F. N. B. 63. H. Raym. 226. 2 Lev. 36.

Execution.

Execution of a Fine or Recovery.

(A) (a) In what (b) Court an Execution may be ſued.

(a) What Courts may award Execution. Poſt Letter L.

(b) Where, and how a Judgment or Sentence in a Foreign Country may be executed here, vide my ſecond Part 265. pl. 12. 272. pl. 25. Skin. 59. 1 Vern. 21.

1. (c) **If a Record comes** in Banco Regis **by Writ of Error, Execution may be ſued there.** (d) 12 H. 4. 23.

(c) 1 Sid. 213. S. P. adjudged, and a Diverſity taken where the Record comes there by Writ of Error, and where removed by **Certiorari, &c.** 1 Lev. 134. S. C. and S. P. and Diverſity. 1 Keb. 758. —— And vide **Riſam** and **Goodwin**, Hutt. 117. Cro. Car. 34. Lit. Rep. 39, 360. Het. 24. (d) Fitz. Execution 27. S. C. Br. Faux Judgment 6. S. C.

(e) Fitz. Execution 27. S. C. Br. Faux Judgment 6. S. C.

2. (e) **If a Record comes** in Banco **upon a Writ of Falſe Judgment, Execution may be ſued there.** 12 H. 4. 23.

3. If a Writ of Error is brought here on a Judgment in *Ireland*, and that Judgment affirmed in *B. R.* and Coſts taxed, *&c.* yet that Court cannot grant a *Capias* directed to the Sheriff of, *&c.* in *Ireland*, to take the Defendant for theſe Coſts. *Mich.* (f) 10 *Will.* between *Coot* and *Linch*, *Salk.* 321. ſuch Execution, upon Motion, ſet aſide, and ſaid, the Method was to have a Writ, reciting all the Proceedings here in *England*, directed to the (g) Judges in the King's Bench in *Ireland*, requiring them to iſſue Execution; and by this mandatory Writ the Cauſe is reſtored to that Court.

(f) 5 Mod. 421. S. C. by which it appears, that the Queſtion was, whether it could be executed here, for the Coſts againſt the Party who was in England, and reſolved it could not, becauſe there could be no Teſtatum, and the acceſſory Part of the Judgment ſhall not be executed there, when the Principal cannot, and therefore the Execution was ſuperſeded. Carth. 460. S. C. (g) That a Special Mandat ſhall be ſent to the Chief Juſtice, vide Cro. Jac. 534. Cro. Car. 512. 1 Rol. Abr. 753. pl. 8. and my Notes thereon, Title Error 27. pl. 8. 2 Bulſt. 118. Yelv. 117. Caſ. Parl. 57.

At what Time.

(B) Upon whom it may be executed by Entry.

1. **If a Judgment be reverſed in a Writ of Error againſt the Heir of the Recoveror, the Demandant may enter upon him without more, tho' he be in by Deſcent.** (h) 9 H. 6. 49.

(h) Br. Error 9. S. C. Fitz. 20. S. C.

2. If

2. If in a Writ of Error against the Heir of the Recoveror the Judgment be reversed, yet he cannot enter upon the Tertenant without a Scire facias. (a) 9 H. 6. 49.

(a) Br. Error 9. S. C. Fitz. 20. S. C.

3. If a Man recovers in a real Action, and the Tenant dies before Execution; yet the Demandant may enter upon the Heir. 10 H. 6. 5. b. 16 H. 7. 8. b. 3 E. 4. 7. (b) 21 H. 6. 17. b. because the Record binds his Title.

(b) Br. Barr 26. S. C.

4. (c) So, tho' it be of Lands in Tail. 10 H. 6. 5. b.

(c) Otherwise if in a false or feint Action. Co. Lit. 361. b.

5. (d) So if a Man recovers in a Real Action, tho' there be two, three, or four Descents before his Entry, yet he may enter upon those to whom descended, because the Recovery binds the Blood and disproves the Title. 6 E. 4. 11. b. 3 E. 4. 7.

(d) For this vide my second Part 560, 561.

6. (e) If a Man recovers in a real Action, and after, before Execution, a Stranger enters and dies seised, yet the Recoveror may enter upon his Heir. 16 H. 7. 8. b.

Fol. 885.

(e) My second Part 561. pl. 5. S. P.

7. If a Man recovers in a Writ of Right of Advowson, and after, at an Avoidance, a Stranger presents, yet when the Church is void again, the Recoveror may present. 16 H. 7. 8. b.

(C) At what Time a (f) Recovery may be executed by Entry.

(f) If there be a Recovery in an Ejectment, the Plaintiff may enter and execute his Judgment, and the Assistance of the Sheriff is only to keep the Peace. Far. 66, 69.

1. He that recovers may as well enter after the Year as within the Year against him upon whom the Recovery was had. (g) 49 E. 3. 23. b.

(g) Fitz. Entry congeable 35. S. C.

2. But he cannot enter upon a Stranger to the Recovery after the Year. (h) 49 E. 3. 23. b.

(h) Fitz. Entry Congeable 35. S. C.

3. He cannot enter after a Descent cast. (i) 49 E. 3. 23. b.

(i) Fitz. Entry Congeable 35. S. C. but vide supra B. pl. 5, 6.

(D) What shall be said an Execution in Law to oust an Action executory.

1. Upon a Fine sur Conusance de droit come ceo que il ad de son done, there shall not be any Execution, for it is executed. 43 E. 3. 15. b.

Seisin of Estates.

2. If Baron and Feme be Tenants in Special Tail by Fine in Remainder, and one dies, and the other enters after the Determination of the particular Estate, and dies, their Issue shall not have any new Execution, tho' he claims as Heir of both their Bodies. (k) 50 E. 3. 6. (l) 49 E. 3. 22.

(k) Fitz. Scire facias 2. S. C.
(l) Br. Scire facias 51. S. C.

3. If

3. If he was ſeiſed of the Land, but not by Force of the Fine, he ſhall have Execution. 25 E. 3. 48. b.

(E) Conjunction of Eſtates.

(a) Fitz. Scire facias 82. S.C. Br. 21. S. C.

1. IF a Fine be levied to one, Remainder to his right Heirs, this is executed, and therefore his Son ſhall not have Execution. (a) 42 E. 3. 9. b.

2. If by Fine there be Leſſee for Life, Remainder in Tail, Remainder in Fee, and the Leſſee ſurrenders to the Remainder in Tail, and after the Remainder dies without Iſſue, and all deſcends to the Leſſee, who enters, by which he is ſeiſed in Fee, and ſo the Fine executed, and dies, his Heir ſhall not have Execution. Contra (b) 42 E. 3. 9. b. becauſe that during the Life of the Leſſee it was not executed. But Brook Scire facias 21. it is ſaid to be a great Error.

(b) Fitz. Scire facias 82. S.C. Br. 21. S. C.

3. But in this Caſe, if after the Surrender, the Remainder in Tail had died without Iſſue, he in the Remainder in Fee might have ſued Execution for his Remainder, for it was not executed. (c) 42 E. 3. 10.

(c) Fitz. Scire facias 82. S.C. Br. 21. S. C.

(d) Br. Fines levy de terre 32. S. C.

4. If Tenant in Tail, Remainder to his right Heirs, dies without Iſſue, his collateral Heir ſhall have a Scire facias for the Remainder in Fee. (d) 7 H. 4. 16. b.

5. If there be an Eſtate to Two, and the Heirs of one of them, and he that hath it for Life ſurvives, the Heir of him who had the Fee may ſue Execution after his Death, or a Mortdanceſtor at his Election. (e) 42 E. 3. 9. b. but Brook Scire facias 21. ſays, quod mirum, (f) that it ſhould be executed at Election.

(e) Fitz. Scire facias 82. S.C. Br. 21. S. C.

(f) But that it may, vide Co. Lit. 184. a. b. where ſaid, the Heir may ſuppoſe the Fee-ſimple executed, and have a Mortdanceſtor, or a Writ of Right, or a Scire facias to execute the Fine, or a Writ of Intruſion, calling it a Remainder.

(g) Br. Scire facias 77. S.C.

6. If an Eſtate be given to Huſband and Wife, and the Heirs of the Huſband; if the Huſband ſurvives and dies, his Heir ſhall not have a new Execution. (g) 11 H. 4. 55. b.

(h) Br. Scire facias 77. S.C. Br. Mortdanceſtor 7. S. C.

7. So it ſhall be if the Wife ſurvives. (h) 11 H. 4. 55. b.

Fol. 886.

8. If there be Leſſee for Life, Remainder in Tail by Fine, and the Leſſee infeoffs the Remainder in Fee, and dies, and after the Remainder dies, his Iſſue ſhall have a * Scire facias, for it is not executed; yet it is there objected, that this Feoffment enures but as a Surrender. (i) 50 E. 3. 6.

(i) Fitz. Scire facias 2. S. C.

(k) Fitz. Scire facias 65. S.C. Br. 60.

9. If Tenant in Tail, after Poſſibility, hath a Remainder in Tail to his Heirs, the Remainder is executed. Contra (k) 7 H. 4. 23. b. adjudged.

10. If there be Tenant in Tail, the Remainder to a Stranger in Tail, the Remainder to the right Heirs of the Donee in Fee; this is not any Execution of the Remainder in Fee, but after the Determination of both Eſtates-tail, the collateral Heir of the Donee ſhall have Execution. 38 E. 3. 17. b.

(F) In what Caſes an Execution of one ſhall ſerve for others.

1. IF a Man be once ſeiſed of an Eſtate, no Execution can be ſued after by any who claims the ſame Eſtate ſo executed.

2. If a Leaſe be made for Life, the Remainder to Baron and Feme in Special Tail, the Baron dies, the Leſſee dies, and the Wife enters, by which ſhe is ſeiſed in Tail, the Iſſue after her Death, tho' he claims as Iſſue of both, ſhall not have a new Execution; for he claims the ſame Eſtate. (a) 49 E. 3. 22. (b) 50 E. 3. 6.

(a) Br. Scire facias 51. S.C.

(b) Fitz. Scire facias 2.

3. If a Fee be executed in the Anceſtor, it ſhall never be executed again by his Heir. (c) 17 E. 3. 29.

(c) Fitz. Scire facias 7. S. C.

4. If a Fee-tail be executed by the Anceſtor, it ſhall never be executed again by his Iſſue in Tail. 29 E. 3. 16. b. adjudged, contra (d) 17 E. 3. 29.

(d) Fitz. Scire facias 7. S. C.

(G) Of what Eſtate it ſhall be ſued.

1. IF a Remainder be limited to one in Tail, with divers Remainders over for Life, the Remainder in Fee to the Remainder-man in Tail; if the Remainder-man die, ſo that the Fee and Tail come together to the Heir, if he ſues Execution, he may ſue it but only for the Tail. (e) 43 E. 3. 12. b.

(e) Fitz. Scire facias 83. S.C. Br. 24. S. C.

(H) (f) How it is to be made.

(f) Where a Leaſe of an Houſe is ſold upon a *Fieri facias*, the Sheriff muſt not put the Perſon out of Poſſeſſion, and the Vendee in, but the Vendee muſt bring his Ejectment. 2 Show. 85. Bridg. 56. S. C. but S. P. does not appear.

1. IF a Recovery be of ſeveral Meſſuages, the Sheriff, upon the Writ of Execution, may make Execution in one in the Name of all, without going to every Particular. My Reports, (g) 14 Jac. per Houghton. Paſch. 15 Jac. B. R. in the ſame Caſe, ſo held per Curiam.

(g) 1 Rol. Rep. 421. S. C. and S. P. ſo held

2. But if a Man be put in Poſſeſſion of ſeveral Meſſuages upon a Writ of Execution, and the Houſes are in the Poſſeſſion of ſeveral Men, he ought to go to every of the Houſes particularly, and thereof deliver Seiſin, and the Delivery of Seiſin of one in the Name of all is not ſufficient. Paſch. 15 Jac. B. R. per Curiam, between Lloyd and Bethell, for the Sheriff ought to give plenam Seiſinam.

3. If a Man brings an Ejectment of forty Acres of Land, and recovers thirty, and not the Reſt; upon a Writ of Execution, the Sheriff may deliver to him any, viz. three or more of the Acres in the Name of all, without ſetting out the Land recovered by

Metes and Bounds, (a) tho' the Plaintiff hath not recovered all the Acres for which he brought his Action, and of which he ſuppoſed the Defendant Tenant. Trin. 15 Jac. B. R. adjudged.

(a) But Palm. 289. it was ſaid by the Chief Juſtice, that the Sheriff ought to ſet forth all the Acres in particular, ſo that the Recoverer might have the Benefit of his Judgment for a Certainty, and the ſeveral Profits without Interruption or Diſturbance.

4. If a Writ of Execution goes to the Sheriff to put a Man in Poſſeſſion of twenty Acres of Land, the Sheriff ought to give him twenty Acres in Quantity, according to the Uſage of the Country where it is, and not according to the Statute. By Reports 14 Jac. (b) Floyd and Bethell, adjudged.

(b) 1 Rol. Rep. 421.

5. If a Man recovers Rent or Common, upon which a Writ iſſues to the Sheriff to put him in Poſſeſſion, and the Sheriff comes upon the Land and delivers to him Seiſin of the Rent or Common by Word; this is well done, and the * Recoveror is in actual Poſſeſſion thereby. (c) 22 Aſſ. 84. per Thorpe.

* Fol. 887.

(c) Fitz. Aſſiſe 228. S. C. Br. Seiſin 36. S. C. Bridg. 56. S. C. but S. P. does not appear.

6. If in an Information of Intruſion in the Exchequer, for intruding into 200 Acres of Land, and forty Acres of Wood, *&c.* upon Not guilty pleaded, the Jury find the Defendant Guilty in twenty Acres of Land and twelve Acres of Wood, and as to the Reſt Not guilty, and thereupon Judgment is given, tho' the Lands in which, *&c.* are not aſcertained, yet they ſhall be by the Appointment of him that purſues for the King; and if he enters on any other Lands or Woods than thoſe in which the King hath an Intereſt, it ſhall be at his Peril. *Trin.* 24 *El. Savil* 28. by *Manwood* Chief Baron, who ſaid the Opinion of the Chief Juſtice was ſo.

7. (d) So if in an Ejectment for twenty Acres, the Defendant is found Guilty as to ten Acres, and Not guilty as to the Reſt, the Plaintiff, at his Peril ſhall, by his own ſhewing, be put in Poſſeſſion. *Trin.* 24 *Eliz. Savil* 28. by *Manwood* Chief Baron.

(d) Portman and Morgan, Cro. El. 465. S. P. adjudged, and for it vide Cro. El. 265.

8. Upon an *Habere facias Seiſinam* or *Poſſeſſionem*, the Sheriff may break the Houſe and deliver Seiſin or Poſſeſſion to the Demandant or Plaintiff, and after Judgment for the Recovery of it, it is not in Right and Judgment of Law the Houſe of the Defendant. *Mich.* 2 *Jac. Seamain's* Caſe, 5 *Co.* 91. *b.* reſolved.

9. In (e) all (f) Caſes where the King is Party, if the Door be not open, the Sheriff may break the Houſe of the Party, either to take him or execute the Proceſs, if he cannot otherwiſe enter therein; but before he enters he ought to ſignify the Cauſe of his Coming, and make Requeſt to have the Door opened, and then upon Denial, *&c.* (g) 5 *Co.* 91. *b.* reſolved.

(e) Not upon ordinary Warrant of Juſtice of Peace, if not for Felony, or the Suſpicion thereof. 1 Bulſt. 146. —— But where a Conſtable hath a Warrant from a Juſtice of Peace to levy a Penalty, to Part of which the King is intitled, he may, upon Demand and Refuſal to open, break Doors to execute his Warrant. 2 Jon. 233, 234. (f) Upon a Capias Utlegat. Goulſ. 179. 4 Leon. 41. Yelv. 28. March 4. S. C. cited, Cro. Car. 537, 538. S. C. cited, 1 Jon. 430. S. C. cited. (g) Seymain and Greſham. S. C. Cro. Eliz. 908. Moor 668. pl. 917.

10. (h) But upon a *Capias*, *Fieri facias*, or (i) other Proceſs at the Suit of a common Perſon, the Sheriff, after Requeſt to open the Doors, and Denial, (k) cannot (l) break the Houſe of the Defendant, which is

(h) 2 Rol. Rep. 137. S. P. arguend.

(i) Not upon an Excommunicato capiendo. Cro. Eliz. 741. (k) Where the Door was a little opened to ſee who was there, and the Bailiffs ruſhed in with drawn Swords. Hob. 62. and vide Hob. 263, 264. —— If outer Door open, the Sheriff on ſuch Proceſs may and ought to break the Door of an Entry or Chamber that is locked, and break open any Cheſt and take the Goods there in Execution. 1 Brownl. 50. Palm. 54. 2 Show. 87. Comb. 17, 327. (l) But a Barn, not Parcel of an Houſe, may in ſuch Caſe be broke, Penton and Brown, 1 Sid. 186. 3 Keb. 698.

his Caſtle, to (a) (b) execute it, for thereupon great Inconveniencies would enſue. (c) 5 *Co.* 92. *b.* and that in ſuch Caſe the Sheriff would be a Treſpaſſer tho' the Execution would be good.

(a) But if one be arreſted, and after eſcapes into his Houſe, the Sheriff may break the Doors to take him; as where one opened his Caſement, and the Sheriff took him by the Hand, &c. 1 Rol. Rep. 138. Palm. 53, 54. (b) Where the Doors being open, the Bailiffs enter, and the Doors are after ſhut, and the Bailiffs impriſoned, the Sheriff may break the Doors for their Delivery. White and Wiltſhire. 1 Rol. Rep. 137. Cro. Jac. 555. Palm. 52, 53. (c) Cro. El. 909. S. C. and S. P. reſolved, Moor 668. pl. 917. S. C. Yelv. 28. S. C. March 4. S. C. cited, Cro. Car. 537. 1 Jon. 430. 1 Bulſt. 46.

11. But ſuch Houſe is no Caſtle or privileged, but for the (d) Owner, nor ſhall protect any Perſon who flies thither, or the Goods of any Perſon conveyed thither to prevent a lawful Execution; for the Privilege of his Houſe extends only to him and his Family, and to his own Goods, or to thoſe which are lawfully there without Fraud; and therefore in ſuch Caſe, after Requeſt and Denial to open, the Sheriff may break the Houſe. 5 *Co.* 93. *a.*

(d) That it is for ſuch Perſon who lies there. Hob. 62.

12. Upon an *Elegit*, the Jury find the Seiſin and Value of the Land, but the Sheriff ought to deliver the (e) Moiety. *Trin.* 9 *Car.* between *Sparrow* and *Matterſon & al'*, *Cro. Car.* 319. reſolved.

(e) By Metes and Bounds.

Hut. 16. 1 Brownl. 38. but vide Dalt. 26. —— Otherwiſe where the Defendant is Jointenant or Tenant in Common with another; but there it ought to be ſo ſhewed ſpecially in the Return. Hut. 16. 1 Brownl. 38. and vide Lit. Rep. 77.

13. If by Inquiſition upon an *Elegit* it be found, that the Defendant had twenty Acres in *A.* and twenty in *B.* the Sheriff ought to deliver the Moiety of twenty Acres in each Town. *Hill.* 16 & 17 *Car.* 2. between the (f) Earl of *Stanford* and *Needham*, 1 *Lev.* 160. *per Curiam*, and where the Sheriff had delivered twenty Acres in one of the Towns for the Moiety of the Whole, it was void, and in an Ejectment brought for the Lands might be avoided.

(f) 1 Sid. 239. S. C. where ſaid it was by trick found, that the Defendant had twenty Acres, when he had but ten, and ſo the Whole delivered upon the Extent. 3 Keb. 858. S. C. where found he had twenty Acres in A. tho' he had nothing there, and by Colour thereof extending all in B. for a Moiety.

Upon a Fine or Recovery.

(I) Againſt whom it ſhall be ſued.

1. IF a Man recovers in an Ejectment againſt J. S. who after dies, he may ſue Execution againſt his Heir, for by Intendment J. S. his Anceſtor the Ejector was a Diſſeiſor. Paſch. 3 Jac. B. R. between Carter and Claypole agreed.

2. (g) If Tenant in Tail ſuffers a Common Recovery, and dies before Execution, it may be ſued againſt his Iſſue. (h) *Shelly*'s Caſe, 1 *Co.* 94. *b.* 96. *a. b.* 106. *b.*

(g) Co. Lit. 361. b. S. P. it ſhall be executed againſt the Iſſue in Tail, in Reſpect of the intended Recompence, and for that it is the common Aſſurance of the Realm. 10 Co. 38. a. S. P. —— But if Judgment be given againſt Tenant in Tail in a faint or falſe Action, no Execution can be thereupon ſued againſt the Iſſue in Tail. Co. Lit. 361. b. vide ante B. 4. (h) Moor 137, 141. S. C. and S. P.

(K) Execution of Fines.

Which want Execution, and which are executed.

1. NO Execution ſhall be ſued of a Fine come ceo que il ad de ſon done, becauſe this Fine proves a precedent Gift and Poſſeſſion, and therefore againſt the Suppoſal, he ſhall not have a new Execution. (a) 41 E. 3. 14.

(a) Fitz. Scire facias 80. S.C. Br. 18. S. C.

(b) Fitz. Scire facias 80. S.C. Br. 18. S. C.

2. But if ſuch Fine be levied in Tail, the Remainder over, he in Remainder may ſue Execution after the Tail ended. (b) 41 E. 3. 14. b.

3. But a Fine ſur grant & render is not executed before Execution ſued. 41 E. 3. 14. b.

How.

(c) Fitz. Brief 535. S. C. Br. Scire facias 18. S. C.

4. In a Scire facias, if he makes his Title as Couſin to another, he need not Count how Couſin. (c) 41 E. 3. 14.

(d) Fitz. Brief 535. S. C. Br. Scire facias 18. S. C.

5. But if he ſhews how Couſin, it is good. (d) 41 E. 3. 14.

For Debts or Damages.

(e) In what Court an Execution may be ſued. Ante A.

(L) (e) What Court may award Execution.

(f) My ſecond Part 296. pl. 1. vide with the Notes there. Noy 17, 20.

1. (f) IF a Recovery be in a Court-Baron, they have no Power to make Execution to the Plaintiff (g) of the Goods of the Defendant, but they may diſtrain the Defendant, and retain the Diſtreſs in their Hands in Safety till he hath ſatisfied the Condemnation. (h) 4 H. 6. 17. b.

(g) So in an Hundred Court a Levari is not the proper Proceſs, but a Diſtringas, unleſs by Cuſtom, and generally Hundred Courts have ſuch Cuſtom. Far. 1, 44. Simpſon and Mayhill, Comb. 125. 1 Show. 47. Carth. 53, 54. Lutw. 1369. (h) Br. Court-Baron 6. S. C.

(i) And where Execution may be ſued, or not, ſuper tenorem recordi, vide All. 17.

2. If a Man recovers in Banco Regis, and thereupon an Attaint is brought in Banco, where the firſt Verdict is affirmed; no Execution can be awarded in Banco, (i) becauſe they have but tenorem Recordi there. Hill. 37 El. B. per Curiam, between (k) York and Allyn.

(k) Cro. Eliz. 371, 372. S. C. and S. P. per Cur', and ſaid, that if the firſt Verdict had been diſaffirmed, and Execution had been before ſued, the Common Pleas might have awarded Reſtitution.

3. But in this Case Execution may be awarded in Banco Regis, for there the Record it self continues. B. R. Hill. 37 El. between (a) York and Allyn adjudged.

(a) Cro. Eliz. 371,372.S.C. adjudged.

4. (b) If a Man recovers in an Inferior Court of Record, Debt or Damage, and after removes the Record in B. R. by Certiorari, whether the Court of B. R. be bound in this Case to grant Execution (c) upon this Judgment, Dubitatur, Mich. 11 Car. B. R. between Pechy and Foster, the Court appointed it to be argued, viz. Whether the Court de B. Regis be bound by such Way to aid Inferior Courts. Intratur Hill. 10 Car. Rot. 74.

(b) As where there was a Recovery in Debt at the Grand Sessions at Carmarthen in Wales, &c. Kilsam and Goodwin, Hutt. 117. Cro. Car. 34. Lit. Rep. 39, 360. Hetl. 24. Vaugh. 398. 1 Saund. 98. but vide Style 9. —— And 2 Inst. 23. it is said, that when Judgment is given before the Sheriff, and the Tenant hath no Goods, &c. in the County, the Record may be removed by Certiorari in B. R. and thence Execution may go. 2 Inst. 23. and vide F. N. B. 246. (c) But after the Record is so removed by Certiorari, perhaps Debt may lie thereon, and so after Judgment there, and Execution thereupon had. Hutt. 117. Lit. 39, 360. Cro. Car. 34. Hetl. 24. 1 Sid. 214. 1 Lev. 134.

5. If one is attainted by Act of Parliament, the Court of King's Bench (d) may award Execution, the Party and Record of Attainder being brought before them. *Pasch.* 14 *Car.* 2. between the (e) *King* and *Okey & al'*, 1 *Lev.* 61. which *vide* and the Proceedings thereon.

(d) So where one was at St. Albans, attainted of Felony. Cro. Car. 176. —— Where Attainders elsewhere, Sir Walter Rawleigh's Case. Cro. Jac. 495. Hutt. 21. and vide Poph. 131. Mod. Cas. 195. (e) Sid. 72. S. C. adjudged, 1 Keb. 244. S. C.

6. (f) If a Conviction for Deer-stealing be removed in *B. R.* by *Certiorari*, and there confirmed, that Court may award Execution by *Fieri facias*; and if the Sheriff returns *nulla bona*, may grant a *Capias* against the Body. *Pasch.* 4 *Will.* between the (g) *King* and *Rogers*, *Carth.* 231. adjudged.

(f) King and Pullen S. P. Salk. 369. adjudged, Comb. 213. adjudged, — King and Chandler S. P. Salk. 378. adjudged, and that the Executors of the Owner of the Park, or Churchwardens might sue out a Levari, &c. 5 Mod. 446. but this Point does not appear; and vide Salk. 379. That the King's Bench must award Execution, for that the Record could not be sent back, but vide 2 Keb. 813. (g) Salk. 369. S. C. cited.

(M) (h) (i) Of what (k) Things it may be.

(h) What Things may be put in Execution. 1 Rol. Abr. 891. Y.

(i) What Things may be extended upon a Statute, vide 2 Rol. Abr. 472.

1. Lands which one hath in Extent upon a Statute Merchant may be extended upon an Elegit. (l) 31 Ass. 6. admitted. (m) 38 Ass. 4. admitted.

(k) Upon a Levari facias to levy the yearly Value of 55 l. found by Inquisition on an Outlawry upon a Judgment in Debt, the Beasts of a Stranger levant and couchant on the Land may be taken, for they are the Issues of the Land. Bitton and Cole, Salk. 395. 5 Mod. 112, 113, &c. and said the Writ in this Case was to levy the Money de exitibus terre. Carth. 441. adjudged, Skin. 617. adjudged, Comb. 434, 469. but for this vide under Title Utlegary, and 2 Rol. Abr. 159. I. 2, 3. (l) Br. Assise 318. S. C. (m) Br. Execution 84. S. C. 3 Leon. 156. S. C. cited, 1 Rol. Abr. 933. A. 1. S. C.

(n) 2. A Copyhold is not extendable upon an Elegit. Pasch. 8 Jac. B. Co. 3. Heydon 9. per Curiam.

Fol. 888.

(n) Savil 67. S. C. and S. P. per Manwood Chief Baron, and vide Cro. Car. 44. Hard. 433.

3. If a Copyholder Leaſes for Years by Leave of the Lord, (a) this is not extendable in the Hands of the Leſſee. Paſch. 8 Jac. B. Pictoe's Caſe per Curiam.

(a) Poph. 188. A Caſe was cited to have been adjudged, where ſuch Leaſe was made, that it ſhould not be Aſſets in the Hands of the Executor of the Leſſee, nor be extended; but the Caſe was denied by Juſtice Hutton, and others. —— And by Hob. 177. it ſeems ſuch Leaſe ſhall be taken to be as a Leaſe at Common Law.

4. Lands in Antient Demeſne may be put in Execution (b) upon an Elegit. Paſch. 13 Jac. B. between (c) Cocks and Barnſley adjudged, Co. 5. Alden 105. b. contra 22 Aſſ. 45. contra Dy. 22, 23 El. 373. 13.

(b) So upon a Statute 2 Rol. Abr. 472. P. 8.

(c) Hob. 47, 48. S. C. and S. P. adjudged, 1 Brownl. 234. S. C. and S. P. adjudged, and vide my firſt Part 660. pl. 21.

5. If a Man recovers Debt or Damages againſt a Diſſeiſee of certain Lands, and an Elegit is awarded, yet theſe Lands in the Hands of the Diſſeiſor ſhall not be extended. Trin. 4 Jac. B. R. in Stamere and Amonye's Caſe per Curiam.

6. If a Man recovers againſt J. S. who is the Ceſtuy que Uſe of a Leaſe for Years, (d) this Term cannot be extended upon this Judgment. Paſch. 32 El. B. R. cited to have been adjudged.

(d) The Statute of 19 Hen. 7. cap. 15. ſeems not to have extended to this Caſe, but only where before 27 H. 8. one was ſeiſed, viz. of a Freehold Eſtate to the Uſe of another, vide Br. Execution 172. —— But by the Statute 29 Car. 2. cap. 3. Execution ſhall be of all ſuch Lands, &c. of which any Perſon is or ſhall be in any wiſe ſeiſed or poſſeſſed in Truſt for him againſt whom Execution is ſued.

7. (e) In Debt againſt an Heir upon an Obligation, who hath nothing by Deſcent but a (f) dy Reverſion (expectant upon an Eſtate for Life, as I intend) the Plaintiff ſhall have Judgment to have Execution thereof, quando acciderit. Trin. 12 Jac. B. R. adjudged.

(e) Far. 41, 42. but what Judgment ſhall be given againſt an Heir, vide 2 Rol. Abr. 70, 71.

(f) In the Original it is Seck.

8. If a Man recovers Damages againſt B. who hath a Villein who is poſſeſſed of Goods, theſe Goods cannot be taken in Execution, for theſe are the Chattels of the Villein till the Lord ſeiſe them. 3 E. 3. Iter North, Execution 108.

9. Where one had an Annuity for twenty-one Years granted by Queen *Elizabeth*, payable by her Receiver of her Court of Wards, upon a *Fieri facias* upon a Judgment againſt the Grantee, it was extended and ſold, and *Trin.* 3 *Jac.* between *York* and *Twine*, *Cro. Jac.* 78. upon a Caſe delivered to the Judge's Aſſiſtant of that Court, *viz. Popham*, *Anderſon* and *Fleming*, it was reſolved the Extent and Sale was good, for being an Annuity certain, for Years certain, and payable by the Receiver, it is in Nature of a Rent-charge for twenty-one Years, and is grantable over, and vendible, and not like an Annuity which chargeth the Perſon only.

10. If there are two Coparceners of Goods, and a Judgment is given againſt one of them, the Sheriff upon a *Fieri facias* upon this Judgment muſt ſeiſe all, becauſe their Moieties are undivided; for if he ſeiſes but a Moiety, and ſells that, the other Coparcener will have a Right to a Moiety of that Moiety, but he muſt ſeiſe the Whole, and (g) ſell a Moiety thereof undivided, ſo that the Vendee will be Tenant in Common with the other Partner. *Mich.* 5 *Will.* between *Heydon* and *Heydon*, *Salk.* 392.

(g) 1 Shew. 173. Comb. 217.

(N) How it ſhall be made.

Where joint and where ſeveral.

1. IF a Man recovers in an Aſſiſe againſt Three of Land and Damages, he cannot ſue Execution by Capias againſt one only for the Damages, but it ought to go againſt all, for that the Execution ought to be according to the Original. 15 H. 7. 6. per Curiam.

2. If a Man recovers jointly againſt Three, the Execution ought to be joint againſt all together. Trin. 39 El. B. R. in Adams and Dixon's Caſe, per Curiam.

3. If a Man recovers jointly againſt Two in an Action of Debt, the Execution ought to be joint againſt both, and not againſt one only. Hill. 41 El. B. R. between (a) Beverly and Beverly, adjudged in a Writ of Error. (b) Trin. 8 Jac. B. per Curiam, he cannot have an Elegit againſt one, and a Capias againſt the other, (c) but ought to have one Proceſs againſt both.

(a) Cro. El. 648. S. C. adjudged.
(b) Godb. 181. S. C.
(c) Not a Fieri facias againſt one and a Capias ad Satisfaciendum againſt the other. Godb. 208. Winch 113. and vide 1 Rol. Abr. 904. pl. 6. and the Notes there.

4. In an Action of Debt againſt J. S. if Two become Bail for him, and after the Plaintiff recovers, and after Proceſs is continued till Judgment is given againſt the Bail, the Execution may be againſt (d) any of the Bail, without naming the others, for every of the Bail is bound ſeverally. Trin. 39 El. B. R. between Dixon and Adams.

(d) Execution may be againſt one of the Bail, and after againſt the other. 1 Rol. Abr. 897. G. 3.

5. If Three are bound in a Recognizance (e) jointly, there ſhall be no Execution againſt One or Two of them, but againſt all. *Mich.* 1657. 2 *Sid.* 12.

(e) Where bound jointly and ſeverally, the Conuſee may ſue ſeveral Scire facias's againſt the Conuſors. 2 Inſt. 395.

6. If Two become Bail for one in *B. R.* and according to the Courſe of that Court, they and each of them are bound in a Recognizance, if he be condemned, to bring him in or anſwer the Condemnation, or otherwiſe, that the Debt ſhall be levied of their Lands and Chattels, and after Judgment and *Capias* againſt the Principal, and *Non eſt inventus* returned, a *Scire facias* iſſues againſt the Bail, and thereupon Judgment is had, that the Plaintiff ſhall have Execution according to the Form of the Recognizance, (f) he may have a *Capias* againſt one of the Bail only, for the Judgment in the *Scire facias* is not to recover, but *quod habeat Executionem*, and the Recognizance upon which it muſt be had was joint and ſeveral, and ſo remains not altered by the Judgment. *Mich.* 19 *Car.* 2. between (g) *Gee* and his Wife, and Sir *Francis Fane*, 1 *Lev.* 225. adjudged, and tho' the Recognizance was to levy the Money *de terris & catallis*, yet Execution of the Body is good by the (h) Courſe of the Court.

(f) When one died before any Execution againſt them, vide Skin. 82. — Where upon ſuch Scire facias againſt both, Plaintiff may have a Judgment againſt each, and Execution againſt each. 1 Mod. Caſ. 199.
(g) 1 Sid. 339. S. C. adjudged, for the Recognizance which was joint and ſeveral remained ſo, and is not altered by the Judgment. 2 Keb. 269, 274. S. C.
(h) For this vide 1 Rol. Abr. 897. pl. 3. 904. pl. 6.

7. But

7. But if Two are bound jointly and ſeverally, and both are ſued, and a joint Judgment obtained, (a) the Execution ought to be accordingly, (b) for by the Judgment the Obligation is merged. *Mich.* 19 *Car.* 2. between *Gee* and his Wife, and *Faue*, 1 *Sid.* 239, 240. *per Curiam.*

(a) For this vide 1 Rol. Abr. 904. pl. 6. and the Notes there.

(b) 6 Co. 44, 45.

(O) How to be made.

1. IN an Information upon the Statute of Recuſancy, if Judgment be given for 100 l. tho' the King is to have two Parts, and the Informer the third Part; (c) yet there ſhall not be ſeveral Executions, viz. one for the King, and the other for the Informer, (d) but one Execution for the Whole. Mich. 13 Jac. B. between St. Johns and Grevill, per Curiam.

(c) Where the Informer dies, vide Hard. 161.

(d) Vide Style 18.

(P) (e) Who ſhall have Execution.

1. (f) IF an Adminiſtrator durante minori ætate of an Executor recovers in Debt, * and after the Executor comes to full Age, he ſhall have a Scire facias (g) upon this Recovery, becauſe he is privy to the Judgment. Mich. 9 Jac. B. Margaret Wright's Caſe, per Curiam, adjudged.

(e) Where the Succeſſor of the Preſident of the College of Phyſicians, my ſecond Part 219. pl. 5.

* Fol. 889.

(f) Cro. Car. 227. S. P. cited to have been adjudged, 2 Lev. 37. per Hale doubted, whether Execution ſhould be ſued by the Adminiſtrator or Executor. —— But vide 3 Leon. 278. Noy 104. 1 Brownl. 57. 2 Brownl. 83, 144, 145. Godb. 104.

(g) But in ſuch Caſe the Scire facias againſt the Bail ſhall be by the Adminiſtrator to whom the Recognizance was made by Name. 2 Lev. 37.

2. If a Man makes A. his Executor, with a Condition, That if he doth ſuch an Act, B. ſhall be his Executor, and after dies, and after A. recovers in Debt, and then does the Act, it ſeems B. ſhall have a Scire facias upon this Recovery. Mich. 9 Jac. B. Demurrer contra Mich. 13 Car. B. R. between Walwin and Herbert, per Jones and Crooke, but Barkley contra.

3. If a Woman Executrix to J. S. marries, and the Husband and Wife bring an Action of Debt upon an Obligation in the Right of the Wife, as Executrix to J. S. againſt J. D. and have Judgment againſt him to recover the Debt with Damages and Coſts, and after the Wife dies before Execution ſued, the Husband ſhall not have Execution upon this Judgment, for that he (tho' he be privy to the Judgment) ſhall not have the Thing recovered, but it belongs to the ſucceeding Executor or Adminiſtrator of J. S. Mich. 7 Car. B. R. between (h) Beamont and Longe, adjudged upon Demurrer; I my ſelf being of Counſel with the Plaintiff. Intratur Trin. 6 Car. Rot. 799. Trin. 11 Car. B. R. between (i) Jefferie and Trefferie per Curiam, upon ſuch Writ brought. Intratur Hill. 11. Rot. 679.

(h) Cro. Car. 208, 227. S. C. adjudged, tho' objected the Judgment was for the Coſts and Damages, which belonged to the Husband, tho' the Debt did not, and therefore the Scire facias ſhould be maintained for the Damages; but a Scire facias being as well for the Debt as Damages, it was held not maintainable; and whether he might maintain a Scire facias for the Damages and Coſts, they would give no Opinion. 1 Jon. 248. S. C. adjudged, and ſaid, this Recovery does not turn it to the proper Debt of the Husband, as it would if the Baron and Feme recovered the proper Debt of the Feme. 3 Mod. 64. S. C. cited.

(i) Cro. Car. 464. ſeems to be S. C adjudged.

4. If an Adminiſtrator hath Judgment, and dies, his (a) Executors cannot ſue out Execution on this Judgment, for none ſhall have Execution thereupon, but he that will be ſubject to the Payment of the Debts of the firſt Inteſtate, which the Executors will not. *Trin.* 43 *El.* (b) *Brudenal's* Caſe, 5 *Co.* 9. *b.*

(a) So if he had died Inteſtate, his Adminiſtrator ſhould not. Paſchal and Warren, Noy 81, 82. Palm. 443. Lat. 140.

(b) 1 Jon. 248. S. C. cited.

5. (c) So Adminiſtrators of an Executor ſhall not have Execution upon a Judgment obtained by the Executor. 5 *Co.* 9. *b.* cited to be adjudged (d) 28 *H.* 8. in Serjeant *Bendl.* Reports; (e) ſo an Adminiſtrator *de bonis non* cannot have Execution (f) (g) upon a Judgment obtained by the firſt Adminiſtrator, for a Debt of the firſt Inteſtate, not being privy to the Record. *Paſch.* 1 *Jac.* between (h) *Yates* and *Gough*, *Telv.* 33. adjudged.

(c) Cro. Jac. 394.

(d) N. Bendl. 18. pl. 24. S. C. Levil and Lewknor ſeems to be S. C.

Moor 4. pl. 13. 1 And. 23. tho' by theſe Books the Queſtion was, Whether the Adminiſtrator de bonis non ſhould have Execution. 1 Rep. 96. a. S. C. cited to have been adjudged as to an Adminiſtrator de bonis non. (e) Style 251. S. P. adjudged, My firſt Part 629. pl. 7. L. P. (f) But by 17 Car. 2. cap. 8. made perpetual by 1 Jac. 2. cap. 17. If an Executor or Adminiſtrator obtain ſuch Judgment after Verdict, the Adminiſtrator de bonis non may have a Scire facias and Execution thereon. (g) But if an Executor ſues out an Elegit, and Land is thereupon extended, tho' he dies before the Debt levied, the Adminiſtrator de bonis non may have Benefit thereof. 1 Sid. 29. (h) Cro. Jac. 4. S. C. adjudged, Moor 680. pl. 931. S. C. adjudged, that he could not have Execution, becauſe not privy to the Judgment, but might have Debt but. Q.

6. But if an Adminiſtrator brings a general Action of Treſpaſs for the Goods of his Inteſtate, and recovers and dies, his Adminiſtrator ſhall have Execution upon this Judgment, *quia non conſtat* by the Record, whoſe Goods they were; but when he hath ſo done, the Adminiſtrator *de bonis non* of the firſt Inteſtate ſhall compel him in a Court of Equity to anſwer ſo much Money to him to the Uſe of the firſt Inteſtate. *Paſch.* 1 *Jac.* between *Yates* and *Gough*, *Telv.* 33.

7. (i) If Husband and Wife obtain Judgment in Debt, and the Wife dies, the Husband (without taking out Adminiſtration to her) may have Execution, for by the Judgment it is become (k) a Debt to him. *Paſch.* 26 *Car.* 2. *Gabriel's* Caſe, 1 *Mod.* 179. reſolved.

(i) In Beamont and Long's Caſe, S. P. agreed, Cro. Car. 208, 227. 1 Jon. 248. 1 Sid. 337. S. P. 3 Mod. 189. S. P. arguend.

(k) For this vide Butler and Dell, Cro. El. 844. and vide 3 Mod. 188. a ſtronger Caſe, where Debt brought upon a Judgment in a Scire facias, and vide 2 Leon. 14. 4 Leon. 186.

8. If a Woman obtains a Judgment in Debt, and after marries, and they ſue out a *Scire facias*, and thereupon have an Award of Execution, tho' the Wife dies, yet the Husband (without taking out Adminiſtration) may have Execution upon the Judgment, for the Award upon the *Scire facias* attached in the Husband, and ſhall ſurvive. *Mich.* 9 *Will.* 3. between (l) *Woodier* and *Greſham*, *Salk.* 116. adjudged, tho' objected, the Award on the *Scire facias* made no Alteration, becauſe the Execution muſt be upon the firſt Judgment.

(l) Comb. 455. S. C. by which it appears the Year expired before the Scire facias taken out, and ſaid by Holt Ch. Juſt. that the Debt was attached in him jointly with his Wife, ſo that altho' the Award of the Execution did not alter the Nature of the Debt, yet it altered the Property, but adjourn'd. Carth. 415. S. C. adjudged upon a Writ of Error in B. R. according to the Judgment before given in B. Skin. 682. S. C. adjudged.

(Q) What Perſons may.

Executor.

1. IF a Man recovers Arrears of Rent, all in Damages, his Executor ſhall have Execution thereof, and not his Heir, for by the Recovery it is a Chattel veſted. 46 E. 3. 25. b.

Both.

1. If the Demandant recovers in a Writ of Coſinage, or other Action real, in which he ſhall recover Damages, his Heir ſhall have Execution of the Land, and his Executor of the Damages. (a) 19 E. 4. 5. b. (b) 43 E. 3. 2.

(a) Br. Sci. fa. 190. S. C. Cro. Car. 227, 228. S. C. cited.

(b) Br. Execution 32. S. C.

2. So upon a Recovery in Waſte, the Heir ſhall have Execution of the Land, and the Executor of the Damages. (c) 43 E. 3. 2.

(c) Br. Execution 32. S. C.

Feme.

1. So if a Statute be acknowledged to Baron and Feme, the Feme ſhall have Execution thereof after the Death of the Baron. (d) 48 E. 3. 12. b.

(d) My firſt Part 700. C. 1. S. C. which vide with the Notes there.

2. If in a *Mortdanceſtor*, three Coparceners recover Land and Damages, the Damages, tho' perſonal, depend on the Freehold, being the Principal, which is ſeveral; and tho' the Words of the Judgment be joint, it ſhall be taken for diſtributive; ſo that if Two die, the intire Damages do not ſurvive, but the Third ſhall have Execution only according to her Portion. *Co. Lit.* 198. *a.*

(R) Who ſhall ſue Execution.

The Wife of the Husband, and not his Executors.

1. IF Damages are recovered againſt Baron and Feme in a Quare Impedit by them in the Right of the Feme, and the Baron dies, and the Wife brings an Attaint, ſhe ſhall have Execution of the Damages recovered, and not the Executor of the Husband, tho' the Damages were paid by the Husband in his Life. (e) 46 E. 3. 23. adjudged.

(e) Br. Attaint 18. S. C. Fitz. Damages 174. S. C.

2. If Baron and Feme join in a Quare Impedit in the Right of the Wife, and recover, and the Husband dies, the Wife ſhall have a Writ to the Biſhop, and not the Executor of the Husband. 14 H. 4. 12.

3. But it had been otherwiſe if the Husband alone had brought the Action and recovered. 14 H. 4. 12.

4. If Husband and Wife recover Land and Damages, and the Husband dies, the * Wife shall have Execution of the Damages, and not the Executors of the Husband. (a) 48 E. 3. 13. 28 Ass. 45. granted to the Wife, but said valeat quantum valere potest.

* Fol. 890.

(a) My first Part 701. pl. 3. S. C. which vide, and the Notes there.

5. In an Assise by Husband and Wife, if they recover Damages, and after the Husband dies, the Wife shall have Execution of the Damages, and not the Executors. 28 Ass. (b) 13.

(b) This is mis-printed here as in the Original, and I suppose should be 45, which vide Br. Execution 83. Fitz. Execution 112.

(S) Against whom it lies.

1. (c) IF a Man recovers Damages against Two, and sues a Scire facias against them, to shew why he should not have Execution against them, if one be returned summoned, who makes Default, and that the other hath nothing, &c. he shall have Execution against him that is returned summoned of the Whole. 1 E. 3. 13.

(c) 1 Lev. 226.

2. So if one be returned dead, and the other summoned, who makes Default, Execution shall be awarded against him alone of the Whole. 1 E. 3. 13. b.

3. If A. acknowledges a Recognizance to B. and after acknowledges another Recognizance to C. and C. extends his Recognizance first, yet B. shall have Execution against him, and oust him. 19 E. 2. Execution 250.

4. If a Man recovers Damages against A. against whom Part of the Damages are levied by Fieri facias, but not all, and after A. dies, he may have a Scire facias against the Heir (d) at his Election to have Execution. 19 E. 2. Execution 163. granted at his Peril.

(d) But in the Office of Executors 133, 134. it is said, that if the Defendant dies, leaving Goods sufficient to satisfy the Judgment, the Heir shall not be charged, and Br. Execution 124. a Scire facias was not allowed to go out against the Heir before a Nichil returned upon a Scire facias against the Executors. Carth. 107.

5. If there be a Judgment in Debt against Two, and one dies, upon a *Fieri facias* reciting his Death, Execution may be awarded against the Survivor, for the personal Charge (e) survives. *Mich.* 13 *Car.* 2. between (f) *Edsar* and *Smart*, *Raym.* 26.

(e) But where such Charge shall survive, and for the Diversity between the real and personal Lien, vide 2 Rol. Abr. 87. pl. 2, 3, &c. and the Notes there. (f) 1 Lev. 30. S. C. adjudged, but said, if a Scire facias had been against both, and Judgment thereon, yet the Fieri facias might have been against the Survivor only, or an Elegit against both. 1 Keb. 92, 132. S. C. adjudged, and said, that by taking Advantage of the personal Lien only, he had waived the Benefit of an Elegit against the Heir. Carth. 180. S. C. cited, and S. P. agreed, notwithstanding what is said in Yelv. 209. and some other Books to the contrary.

(T) Against

(T) Againſt whom it may be ſued.

Againſt the Wife of the Husband.

1. IN a Quare Impedit, if Damages be recovered to two Years againſt Husband and Wife, and the Husband dies, the Damages may be levied upon the Wife. (a) 46 E. 3. 23.

(a) Fitz. Damages 78.
S. C. My firſt Part 707. L. P.

(b) 2 Sid. 122. L. P. adjudged.

2. (b) If a Recovery be in Treſpaſs againſt Husband and Wife, Execution may be ſued againſt the Wife after the Death of the Husband. 47 E. 3. 10.

3. If A. recovers by Judgment in Debt againſt B. the Executor of C. and after B. dies Inteſtate, upon which Adminiſtration of the Goods of C. is granted to E. in this Caſe E. is liable (upon a Scire facias) to this Judgment, for he comes under the Judgment; and there is a great Diverſity between a Judgment had by an Executor, for there the Adminiſtrator of the firſt Man comes paramount the Judgment, and where the Judgment is had againſt an Executor, &c. Mich. 5 Car. B. R. between (c) Norgate and Snape, per Curiam, adjudged.

(c) Cro. Car. 167. S. C. adjudged,
1 Jones 214. S. C. and Diverſity taken where Recovery againſt or by an Executor.

4. If a Man recovers in Treſpaſs againſt J. S. where there are ſeveral of the ſame Name, the Plaintiff cannot take any of them at his Election, but he ought to take him againſt whom he recovered. (d) 17 E. 3. 9. 16. b.

(d) Fitz. Averment 28. S. C.

5. So if the Recovery be of Land, if he ſues Execution upon another than him who was Party to the Judgment, tho' he hath the ſame Name, an Aſſiſe lies. (e) 17 E. 3. 9.

(e) Fitz. Averment 28. S. C.

6. If a Man recovers againſt Sir Francis Forteſcue, Knight and Baronet, and the Writ of Execution is ſo alſo; the Sheriff may take Sir Francis Forteſcue, Knight, againſt whom the Judgment was, tho' he be not a Baronet, becauſe he is eſtopped by the Judgment to ſay, he is not a Baronet. (f) My Reports 14 Jac.

(f) 1 Rol. Rep. 461.
S. C. adjudged, Cro. Jac. 482. S. C. and vide 2 Brownl. 48. 1 Rol. Abr. 781. M. 3. 791. F. 5.

7. In a Scire facias to have Execution of Damages recovered in an Aſſiſe againſt Three, who were Parties to the Recovery, if the Sheriff returns Two warned, and that the Third had nothing, Execution ſhall be granted againſt the Two of the Whole. 1 E. 3. 13. Execution 106.

8. If an Execution of Debt and Damage be ſued againſt Two, and one is returned * warned, and that the other hath nothing whereof to be warned, the Plaintiff may have Execution againſt him that had nothing at his Peril. (g) 24 E. 3. 25.

* Fol. 891.

(g) Fitz. Scire facias 128. S. C.

(h) Fitz. Scire facias 128. S. C.

9. But otherwiſe it is where Execution is of Land (for this will be a Prejudice to the other that appears.) (h) 24 E. 3. 25.

10. If a Judgment in Debt is obtained againſt a Feme ſole, who after marries, and then a *Scire facias* is thereupon brought againſt Husband and Wife, and after two *Nichils* returned, Judgment is given, that the Plaintiff ſhall have Execution againſt them, and the Wife dies, the

Husband ſhall be liable to this Execution. *Mich.* 3 *Jac.* 2. between (a) *Obrian* and *Ram*, *Carth.* 30. adjudged upon a Writ of Error upon a Judgment, upon a *Scire facias* after the Year brought againſt the Huſband, and the Judgment in *B.* and in *B. R.* in *Ireland* affirmed accordingly.

(a) 3 Mod. 186. S. C. adjudged, Comb. 103, 104. S. C. adjudged,

My firſt Part 719. pl. 7. S. C. Salk. 116, 117. S. C. cited, Skin. 682. S. C. cited, and as to the like Proceedings upon a Decree in Equity, vide 2 Vern. 169.

For Land.

(U) Againſt whom the Execution may be of Land.

1. AN Elegit lies not againſt a Prior or other Man of Religion. (b) 21 E. 3. 11. but quære cauſam.

(b) Fitz. Execution 125. S. C.

(X) To what (c) (d) Place it ſhall be awarded.

(c) Where executed in one County, tho' Fact done and Trial in another. Cro. Car. 176. 3 Mod. 124, 125. 1 Mod. Caſ. 94.

1. IF a Man recovers Damages in an Action of Waſte in one County, the Writ to levy it ſhall iſſue to the Sheriff of the ſame County where the Action was firſt brought, and not to any other. 29 E. 3. 9. b.

(d) The firſt Scire facias to have Execution on a Recognizance ought to be in the County where acknowledged, and when ſued there, and the Party is returned dead, it may be ſued againſt the Heir or Tertenants in any County. Cro. Car. 313.

2. But if the Sheriff returns he hath nothing, he ſhall have Execution in any other County where the Recoverer will. 29 E. 3. 9. b.

3. If a Recognizance of Bail be taken by a Judge de Banco at Serjeants Inn in London, upon an Original brought in London, and it is certified into the Court de Banco, and there inrolled; but it appears of Record, that it was taken as before; a Scire facias may be awarded upon this Recognizance to the Sheriff of London, where the Capias was, for there was the Commencement thereof. Mich. 19 Car. B. Rot. 141. (e) cum Farmer, between Johns Plaintiff, againſt Lee and Pomeroy Manucaptors for Rice Edward, upon a Recognizance of Bail. 5 Ma. Brook Lieu and County 85. per Brook, and all the Prothonotaries de Banco. Alſo in the Caſe aforeſaid, the Scire facias may be awarded to the Sheriff of Middleſex, where the Recognizance was enrolled. Paſch. 23 Car. B. R. between (f) Andrews and Harborne, adjudged upon a Demurrer. Intratur.

(e) So is the Original, but what is meant thereby I know not.

(f) All. 12. S. C. by which it appears, That Judgment was given in B. and after affirmed upon a Writ of Error accordingly; and in this Caſe it was ſaid by Rolle, that the moſt antient and proper Courſe was, to bring it where the Recognizance was taken. Style 9. S. C. adjudged, and ſaid the Recognizance being in B. it was both Ways.

4. Middleſex, Paſch. 20 Car. B. R. Rot. 210. adjudged between (a) Pultney and Forebench to be well brought, and this upon Debate upon my Motion, Middleſex, Hill. 17 Car. B. R. Rot. 745. between Goddard and Vouchers, Middleſex, Trin. 18 Car. B. R. Rot. 785. between Gutch and Dayntree, Middleſex, Paſch. 19 Car. B. R. Rot. 77. between Smith and Norton, Trin. 19 Car. B. R. Rot. 388. between Felgate and Gardiner. Note, Theſe Precedents were ſhewed in the ſaid Caſe between Pultney and Forebench; and note, that in the Caſe between (b) Andrews and Harborne, upon my Motion to have the Opinion of the Prothonotaries touching the Courſe in ſuch Caſe, they certified it might well be brought (c) in Middleſex, or in London, and that it had uſed to be brought either in London or Middleſex, contra 5 Ma. Brook, Lieu and County, by Brook and all the Prothonotaries de Banco, that it ought to be brought in London, and not in Middleſex.

(a) All. 12. S. C. cited.

(b) All. 12. S. C. and Certificate, and vide 1 Vent. 183. Mod. Caſes 290.

(c) So where Bail taken by Commiſſioners in the County of York, a Scire facias lies againſt them either in the County of York or Middleſex. 2 Lutw. 1287.

5. If a Man hath Judgment in *B.* for 100 *l.* (d) upon his Prayer he may immediately have an *Elegit* into as many Counties as he pleaſes; between (e) *Goodier* and *Ince*, *Trin.* 8 *Jac. Cro. Jac.* 246. admitted *per Curiam*; but in this Caſe the Plaintiff taking an *Elegit* into the County of *Lancaſter*, with a *Teſtatum*, that another had been before directed to the Sheriff of *London*, who had before returned a *Nihil*, and (f) it appearing there had been no ſuch Return, it was held to be Error.

(d) The Plaintiff may pray ſeveral Writs of Execution of all the Goods, and the Moiety of the Lands of the Defendant in every County, and not for Part of the Debt in one County, and Part in another; and yet the Plaintiff ſhall be ſatisfied with one Execution only, if the Goods and Lands in one County will pay him. N. Benl. 59. pl. 101. Moor 24. Dalt. 29. Dyer 162. b. 208. a. Hob. 57.

(e) Yelv. 179. S. C. adjudged, tho' according to the Prayer of the Plaintiff he might immediately have taken an Elegit into both Counties, yet when he waived that Benefit and grounded his Elegit upon a Teſtatum, which is falſe, it is Error. 1 Brownl. 107. S. C. 2 Brownl. 209. S. C. and vide Hob. 68. Style 455.

(f) If one filed, tho' not actually returned by the Sheriff, but by the Attorney of Courſe, in his Name, it is well enough. 1 Salk. 590. and vide Far. 139.

6. The Courſe of the King's Bench and Common Pleas are very different as to the Entry of a (g) Recognizance taken at a Judge's Chamber; in the King's Bench they always enter it as taken in Court, and are no Record till entered; but in the Common Pleas it is entered ſpecially, and was a Record immediately upon the firſt Caption, and bound Lands before entered at Weſtminſter; and, when filed in Court, is a Record in Court, and a Scire facias or (h) Debt lies upon it, either in Middleſex or London, where taken; but on ſuch Recognizance in the King's Bench, the Scire facias muſt be brought in Middleſex. Mich. 2 Ann. between Shutle and Wood, Salk. 564, 600, 659. per Holt; and in this Caſe, in an Action of Debt upon this Recognizance in B. the Plaintiff having declared quod per ſcriptum obligatorium, acknowledged in B. coram Tho. Trevor & ſociis ſuis, &c. upon Nul tiel Record pleaded, it appearing it was taken by one of the Judges at his Chamber, Judgment was given againſt the Plaintiff, and the Uſage to declare in this Manner being inſiſted on, the Chief Juſtice ſaid it was againſt Law.

(g) 6 Mod. 42. S. C. adjudged per totam Curiam, notwithſtanding the Uſage for twenty Years to declare ſo was inſiſted on, the Entry of the Recognizance being, that it was taken at the Judge's Chamber; and if the Plaintiff would have declared in this Manner, it ſhould have been entered as taken in Court.

(h) That ſuch Action of Debt lies in London, vide Hall and Wingfield, Hob. 195. but Hobart ſaid, that if the Entry had been general, that the Recognizance was taken before the Judge, without ſaying where, it would have been intended in Court. —— But that there is a Diverſity between an Action of Debt on a Judgment and a Scire facias thereon, vide Muſgrave and Wharton, Yelv. 218. a notable Caſe and Diſtinction, tho' not mentioned in the ſame Caſe as reported. Hob. 4. Cro. Jac. 331, 353. and vide Mod. Caſes 73. Hob. 196.

(Y) (a) (b) (c) What Things may be put in Execution.

(a) Of what Things Execution may be. 1 Rol. Abr. 887, 888.

1. A Sheriff, upon a Writ of Execution, cannot ſell to the Party a Furnace annexed to the Freehold; for it ſeems this would be (d) Waſte in him that had the Land, being a Leſſee. Dubitatur Hill. 37 El. B. Day againſt (e) Auſten and Bisbich.

(b) Upon a *Fieri facias* the Sheriff may take any Thing but wearing Apparel; and if the Party hath two Gowns, the Sheriff may take one of them. Comb. 356. ſaid by Holt.

(c) Not Goods pawned, demiſed or diſtrained. Br. Pledges 28. Cro. Car. 149, 150. 1 Rol. Abr. 893. pl. 1. —— Where not Goods before ſeiſed upon an Execution, tho' wrongfully ſo. 1 Show. 174. ſeems to be admitted. —— Otherwiſe if Goods ſeiſed upon a *Fieri facias* for a juſt Debt, the Sheriff not being ſuffered by the Creditor to proceed further, for the firſt Execution ſhall be taken to be fraudulent. Far. 37, 38. (d) Co. Lit. 53. a. but for this vide 2 Rol. Abr. 819. and the Notes there. (e) Owen 70, 71. S. C. and a Diverſity taken by Dyer and Owen, when a Furnace is fixed to the Middle of the Houſe, and when to the Wall; for if to the Wall, it is Waſte, for taking it away, ſo Waſte. 2 Roll. Abr. 555. pl. 10.

2. If a Sope-boiler, or other Trader, being an Under-tenant, for the Convenience of his Trade, puts up Fats, Coppers, Tables, Partitions, and paves the Backſide, *&c.* upon a *Fieri facias* againſt him, the Sheriff may take them in Execution in like Manner as the Leſſee might have removed them during the Term. *Mich.* 2 *Ann. Poole*'s Caſe, *Salk.* 368. held by *Holt* Ch. Juſt. at the *Niſi prius.*

3. Otherwiſe where ſuch Trader makes Hearths and Chimney-pieces to compleat the Houſe, and not for the Conveniency of his Trade. *Salk.* 368. by *Holt* Ch. Juſt.

4. If one be Tenant for Years, without Impeachment of Waſte, and a *Fieri facias* comes out againſt him, the Sheriff cannot cut down and ſell Timber, for the Tenant had only a Power ſo to do, and no Intereſt, as he hath in ſtanding Corn, which upon a *Fieri facias* againſt him the Sheriff may ſell. *Salk.* 368.

(Z) (f) To what (g) Time it ſhall relate for Land.

(f) In the Caſe of the King. 2 Rol. Abr. 156. vide, and the Notes there.

1. If Judgment for Debt or Damages be given in Banco upon a Trial by * Niſi prius, the Plaintiff ſhall have Execution of the Land the Defendant had the Day of the Niſi prius, for this and the Day in Bank are but one Day in Law. (h) D. 3, 4 Ma. 149, 80. 17 E. 3. 5. b. 18 E. 3. 14. b. (i) 18 E. 3. 38. b.

* Fol. 892.

(g) If the Tenant aliens pending the Precipe, the Recovery ſhall bind him, and every one after claiming under him. Goulſ. 105. and vide Moor 21. (h) This was in an Action of Debt againſt an Heir, who had aliened pending the Writ, vide, (i) Fitz. Execution 58. S. C. being in an Action of Waſte tried at Niſi prius.

2. So he ſhall have Execution of the Land that he had the Day of the Inqueſt taken. (k) 21 E. 3. 51. b. 30 E. 3. 30. adjudged, 15 E. 3. Execution 64. 31 E. 3. Execution 66. (l) 18 E. 3. 38. b.

(k) Fitz. Execution 68. S. C.

(l) Fitz. Execution 58. S. C. being in an Action of Waſte tried at Niſi prius.

3. In an Aſſiſe, if after the Aſſiſe is taken it is adjourned for Difficulty, and after Judgment is given for the Plaintiff, he ſhall not

not have Execution for Damages of the Land, that he had the Day of the Inquest taken. (a) 21 E. 3. 51. b.

(a) Fitz. Execution 68. for that Judgment is given at another Day.

4. If a Man recovers Debt or Damage by Trial, by Inquest in Banco, he shall have Execution of the Land which the Recoveree had the Day of the Inquest taken. (b) 18 E. 3. 38. b. contra 19 E. 2. Execution 249.

(b) Fitz. Execution 58.

5. If a Man recovers Damages against another, he shall not have Execution of the Land that he had the Day of the Writ purchased. (c) 29 E. 3. 27. (d) 18 E. 3. 38. b. 30 E. 3. 26. 31 E. 3. Execution 66. tho' averred, that he had granted his Chattels and Lands two Days before the Inquest taken, to take from him the Execution.

(c) Fitz. Execution 157. S. C.

(d) Fitz. Execution 58. S. C.

6. Nor of the Land that he had when he first came to answer, if it was in another Term than that in which the Judgment was. (e) 42 Ass. 17. adjudged.

(e) Br. Execution 87. S. C. Br. Elegit 17. S. C.

7. If a Man recovers a Manor, he shall have all Arrearages incurred between the Recovery and Execution. (f) 48 E. 3. 16. b.

(f) Br. Arrearages 5. S. C.

8. If an Inquest be taken by Nisi prius in an Action of Debt, and the Plaintiff recovers, and the Defendant, to (g) extort the Plaintiff of the Execution, the third Day after the Inquest was returned, had alienated his Land; yet the Plaintiff shall not have Execution of the Land that he had at the Time of the Inquest returned. 14 E. 3. 72. adjudged.

(g) So is the Original.

9. If a Man sues Execution out of a Recognizance, he shall not presently have Execution of his Land that he had the Day of the Recognizance made. 29 E. 3. 32. Curia contra 1 E. 3. 12.

10. But if upon this the Sheriff returns Nihil, then Execution shall be of his Land which he had the Day of the Recognizance made. 29 E. 3. 32. Curia.

11. If a Man acknowledges a Recognizance before a Judge de Banco, or de (h) Banco Regis out of Court, as at Serjeants Inn out of Term, and after this is entered upon the Roll of Record in the same Court where he is Judge; this shall bind the Person and Lands of the Conusor from the Time of the Acknowledgment of the Recognizance; for this is a Recognizance from that Time. (i) Fol. 195. S. C. Hobart's Reports (i) 264. between Hall and Wingfield per Curiam.

(h) But vide supra under Letter (X).

12. (k) If a Man recovers Debt or Damages, he may sue Execution of any Land which he had at the Time of the Judgment. 30 E. 3. 24. (l) 42 Ass. 17. 28 Ass. 41. 6 E. 3. 15. and not of the Land which he had the Day of the first Writ purchased.

(k) Of a Moiety of such Lands as he had at the Time of the Judgment only, unless conveyed away before by Fraud and Covin, to deceive his Creditors, contrary to the Statute in that Case provided. 2 Inst. 395. (l) Br. Execution 87. S. C. Br. Elegit 17. S. C.

13. If a Man recovers Debt or Damages, he shall have Execution of the Land which he had the first Day of the Term, in which he recovers, for the Term is but one Day in Law. (m) 42 Ass. 17. adjudged.

(m) Br. Execution 87. S. C. Br. Elegit 17. S. C. but vide the Statute of 29 Car. 2. under this Title Pl. herein after mentioned.

14. If a Man recovers Debt Execution may be sued of any Lands which he hath purchased after the Judgment. 30 E. 3. 24.

15. **If a Man recovers in Debt, he may ſue Execution of any Lands he had at the Time of the Judgment, (a) tho' he hath alienedit before Execution.** 30 E. 3. 24.

(a) And if extended upon a Statute acknowledged after the Judgment, a Moiety thereof may be extended on an Elegit upon the Judgment. 1 Brownl. 38.

16. **So it may be ſued of any Land which he had by Purchaſe after the Judgment, tho' he hath alienedit before Execution.** 30 E. 3. 24.

17. Upon a Judgment in Debt the Plaintiff ſhall have Execution only of the Land which the Defendant had at the Time of the Judgment, for that the Action was brought in Reſpect of the Perſon, but not of the Land. *Co. Lit.* 102. *a.*

18. But if an Action of Debt be brought againſt the Heir, and he aliens hanging the Writ, yet ſhall the Land, which he had at the Time of the Original purchaſed, be charged, for that the Action was brought againſt the Heir in Reſpect of the Land. *Co. Lit.* 102. *b.*

19. If a Man be nonſuit, the Land only which he had at the Time of the Amercement aſſeſſed ſhall be charged, and not that which he had at the Finding the Pledges, for the Amercement is not in Reſpect of the Land, but his Want of Proſecution, which was a Default in his Perſon. *Co. Lit.* 102. *b.*

20. But the Iſſues of a Juror may be levied upon his Feoffee, tho' loſt after the Feoffment, becauſe he was returned and ſworn in Reſpect of the Land. *Co. Lit.* 102. *b.*

21. If in Debt againſt an Executor, Judgment is given, and a *Fieri facias de bonis Teſtatoris* iſſues, upon which a *Devaſtavit* is returned, an *Elegit* may iſſue *de terris propriis* of the Executor, which he had the Day of the firſt Judgment. *Mich.* 32 & 33 *Eliz.* between (b) *Mead* and *Cheyney*, *Moor* 299. *pl.* 446. adjudged.

(b) Cro. Eliz. 216. S. C. adjudged, 2 Leon. 188. S. C. adjudged, that an Elegit lies; but in neither of the Caſes is it ſaid of the Lands which the Executor had the Day of the firſt Judgment.

22. If one becomes Bail for another in *B. R.* in an Action of Debt, and Judgment is after given againſt the Principal, *&c.* no Extent can be of the Lands of the Bail *bona fide* ſold or leaſed after his becoming Bail, and before the Judgment againſt the Principal; for the Bail's Recognizance is not in a Sum certain, but only that if Judgment be given againſt the Defendant, and he does not pay the Condemnation, or render his Body to Priſon, *tunc concedit quod debitum*, *&c.* ſo that unleſs and until the firſt Part happen, it is no Recognizance. *Mich.* 15 *Jac.* between *Baskerville* and *Brochel*, *Cro. Jac.* 449, 450. adjudged.

23. But it ſeems otherwiſe in *B.* (c) where the Recognizance of the Bail is always in a Sum certain, and againſt them Execution may be of the Lands they had when they acknowledged the Recognizance. *Mich.* 15 *Jac.* between *Baskerville* and *Brochel*, *Cro. Jac.* 449, 450. ſeems to be admitted.

(c) For this Diverſity in the Courſe of the ſeveral Courts, My firſt Part 681. pl. 1. vide the Notes there in the Margent.

24. By the Statute 29 *Car.* 2. *cap.* 3. reciting, that whereas it had been found miſchievous, that Judgments in the Courts at *Weſtminſter* relate to the firſt Day of the Term whereof entered, or to the Day of the Return of the Original or filing Bail, and bind their Lands from that Time, tho' acknowledged, ſuffered and ſigned in the Vacation after the Term whereby Purchaſers are grieved; it is enacted, that any Judge or Officer of the Courts at *Weſtminſter*, who ſhall ſign any Judgment, ſhall ſet down the Day and Year of his ſo doing in the Paper Book, *&c.* where ſigned, which Day and Year ſhall be entered on the Margent of the Record, where Judgment ſhall be entered, and

such Judgment (a) againſt Purchaſers *bona fide*, for a valuable Conſideration of Lands, *&c.* ſhall be Judgments only from ſuch Time as ſigned, and ſhall not relate to the firſt Day of the Term whereof entered, or of the Return of the Original or filing Bail.

(a) Yet in Reſpect to Plaintiff and Defendant, and all other Purpoſes, it is a Judgment of the firſt Day of the Term by Fiction of Law. Mod. Caſes 189, 310.

Fol. 893.

(b) *To what Time it ſhall relate for Chattels.*

(b) In the Caſe of the King. 2 Rol. Abr. 157. and the Notes there.

(c) In the Original it is Wiſe.

(A) What Goods ſhall be (c) taken in Execution.

1. If an Executor ſells any Goods to another pending an Action againſt him, and before Judgment theſe Goods ſhall not be taken in Execution, for they were lawfully bought. (d) 9 H. 6. 57. b. Curia.

(d) Fitz. Executors 7. S. C. Br. Executors 14. S. C.

2. If a Man after Judgment, and before Execution taken out, ſells his Chattels by Fraud to avoid the Execution; theſe Goods, (e) at the Common Law, could not be taken in Execution. 3 E. 3. Itinere North, Execution 108.

(e) By the Common Law an Eſtate made by Fraud was avoidable only by him that had a former Right, Title, Intereſt, Debt or Demand. 3 Co. 83. a.

3. If a Man recovers againſt J. S. and ſues Execution by Fieri facias, (f) the Chattels that J. S. had at the Time of the (g) Execution awarded, are liable to the Execution. Hill. 11 Jac. B. between (h) Cummin and Brandlin, adjudged by Admittance.

(f) Thoſe which he had at the Time of the Execution awarded, and not thoſe he had at the Time of the Judgment, otherwiſe of Lands. Kelw. 87. 8 Co. 171. a.

(g) And if after Extent awarded, and before Inquiſition taken the Defendant ſells his Goods, the Sheriff may extend them. Moor 21. pl. 72. per Dyer and Weſton, Cro. El. 174. 1 Leon. 104. vide Audly and Hall. See my firſt Part 691. vide the Notes there.

(h) Moor 873. pl. 1216. S. C. adjudged, 1 Brownl. 38. S. C. adjudged.

4. (i) As if after Execution awarded againſt J. S. he dies, yet the Sheriff may after execute the Writ upon the Goods in the Hands of his Executors or Adminiſtrators, in as much as the Goods were bound by the Award of the Execution. 16 H. 7. 6. b. per Brian, in an Execution upon a Statute Staple.

(i) 1 Leon. 145. S. P. 1 Mod. 188. S. P. by the other Judges, con. Vaughan.

5. So if a Man recovers againſt J. S. as Executor of W. S. of the Goods of the Deceaſed, if he hath, &c. and if not de bonis propriis, and ſues Execution accordingly by Fieri facias, and after, before Execution made by the Sheriff, J. S. dies, the Sheriff, if he finds no Goods of W. S. the firſt Teſtator, he may execute the Writ upon the proper Goods of J. S. that he had at the Time of the Execution awarded, tho' they are now in the Hands of his Executor or Adminiſtrator, without ſuing a Scire facias, in as much as they were bound by the Award of the Execution. Mich. 31 & 32 El. B. R. but adjudged Hill. 32 El. between (k) Parks Plaintiff, and Moſſe and Howe, Defendants.

(k) 1 Leon. 144. S. C. adjudged, Moor 352. pl. 473. S. C. adjudged, Cro. El. 181. S. C.

6. If an Elegit be erroneous, upon which an alias Elegit is granted, all the Goods which he had at the Time of the Execution granted are liable. B. R. Humphry's Caſe cited, Hill. 11 Jac.

7. If one after Judgment againſt him by Deed had *bona fide* bargained and ſold his Goods, and a *Fieri facias* bearing Date the ſame Day as the Deed had been taken out (before the Statute 29 *Car.* 2.) theſe Goods might have been taken in Execution; for by the ſuing forth the Execution all the Defendant's Goods were liable, ſo as no Gift thereof the Day of the Date of the Writ, (a) or after, could ſtop the Execution. *Mich.* 37 & 38 *Eliz.* between *Benche* and *Wiſeman*, *Cro. El.* 440. adjudged.

(a) Quære, If after the Teſte and before the Writ was actually taken out, vide Bayly and Banning, 1 Lev. 173. 1 Sid. 271, 272. 1 Keb. 390, 982. 2 Keb. 32, &c.

8. By the Statute of 29 *Car.* 2. it is enacted, that no *Fieri facias*, or other Writ of Execution, ſhall bind the (b) Property of Goods but from the Time ſuch Writ ſhall be delivered to the Sheriff, Under-ſheriff, or Coroner, to be executed, and for the Manifeſtation of the Time, the Sheriffs, *&c.* their Deputies and Agents, upon the Back of the ſaid Writ, ſhall endorſe the Day and Year when received.

(b) This muſt be intended as to Strangers who might have a Title to the Goods between the Teſte of the Writ and Delivery thereof to the Sheriff, but as to the Party himſelf, his Executors and Adminiſtrators, the Goods ſince the Statute as before, are bound from the Teſte. 2 Vent. 218. per Curiam, Comb. 33. 2 Show. 485. Mod. Caſ. 225.

9. At Common Law, if two Writs of *Fieri facias* had born *Teſte* the ſame Day, the Sheriff was bound to execute that firſt which was firſt delivered to him; in the Caſe of *Smalcomb* and *Buckingham*, (c) *Salk.* 320. held *per Curiam*.

(c) 5 Mod. 320. S. C. but S. P. does not appear.

10. So where ſince the Statutes, two Writs are delivered the ſame Day to the Sheriff. *Salk.* 320.

11. Where ſince the Statute *A.* delivered a *Fieri facias* to the Sheriff at Nine in the Morning, and after, at Ten the ſame Day, *B.* delivered another, deſiring him forthwith to execute it, which he did, and ſold the Goods, and after executed *A.*'s *Fieri facias* on the ſame Goods; it was held the firſt Execution was good, and *A.* had Remedy only by Action againſt the Sheriff. *Mich.* 9 *Will.* between (d) *Smalcomb* and *Buckingham*, *Salk.* 320. adjudged.

(d) 5 Mod. 376. S. C. Comb. 428, 452. S. C. and Holt inclined there ſhould be no Fraction of a Day, and that the Sheriff had his Election. Carth. 419. S. C. the laſt Writ bearing Teſte firſt; and per Holt C. J. where a Fieri facias is delivered to the Sheriff to Day, and another to Morrow, and he executes the laſt firſt, by making Sale of the Goods, ſuch Sale will ſtand good, and he who delivered the firſt Writ hath Remedy only by Action againſt the Sheriff. —— But if two Writs are delivered to the Sheriff the ſame Day, he ought to give Preference to that which was firſt deliver'd; but if he executes the laſt firſt, the Execution cannot be defeated by a ſubſequent Execution of the Firſt; but the Party concerned in the Firſt is put to his Action againſt the Sheriff.

12. But if *A.* when he delivered his Writ, had ordered the Sheriff to ſtay Execution till next Day, he could have had no Action againſt the Sheriff. *Salk.* 320.

(B) At what Time Goods ſhall be put in Execution.

1. IF by the Cuſtom of a Will a Man may (a) attach the Goods of his Debtor, and that theſe Goods ſhall be taken in Execution if the Suit paſſes for him, and he attaches the Goods accordingly; yet before the Trial of the Action, if another hath an Execution againſt the ſame Man, theſe Goods may be taken in Execution, for he ſhall have all the Property which the Owner had, viz. to have the Goods if the Suit paſs againſt the Plaintiff, or the Overplus, if any there be, (and it (b) ſeems he may take them preſently, if he will pay the Debt, if it be recovered) for the Party himſelf might pay the Debt, and diſcharge the Goods. Mich. 14 Jac. in Camera Stellata per Hobart and Tanfield, adjudged between and Darſon Ironmonger, Defendants.

(a) By the Stat. 21 Jac. it is provided, that Goods attached in London by Foreign Attachment ſhall be ſold by Commiſſioners of Bankrupts, which proves they had no Power by the general Words of the 13 El.

to meddle with them, and yet they are but a Pledge to oblige the Party to appear, and upon that ſhall be diſcharged. Cro. Car. 150. (b) Quere, If he may pay the Money due on a Pawn, and take it, &c. vide ſupra Y. and the Notes in the Margin.

2. If the Sheriff, upon a Fieri facias againſt J. S. ſeiſes certain Woods, of which J. S. was poſſeſſed, and the Sheriff (c) pays Part of the Money recovered, and does not return his Writ, and after the Sheriff is removed and another Sheriff choſe, and after a Writ of Diſcharge to him directed and delivered, he ſells the ſaid Woods; this is a lawful Sale, becauſe by the Seiſure, tho' the Writ be not returned, he is chargeable to the Party. Trin. 3 Jac. B. R. between (d) Aire and Aden, which intratur Paſch. 44 El. Rot. 308. adjudged, 34 H. 6. 36. adjudged, for there a Diſtringas iſſued to the new Sheriff to diſtrain the old Sheriff to expoſe to Sale, which does not give him an Authority to ſell, but * compels him to do that which he ought to have done before by the Law.

(c) Hob. 207. A Queſtion by him moved, if a Sheriff having a Fieri facias or Capias ad Satisfaciendum, pays the Plaintiff his

* Fol. 894.

Money of his own, whether he may levy the Money of the Defendant after. (d) Cro. Jac. 73. S. C. adjudged, Moor 557. pl. 1045. S. C. adjudged, the Sale good, becauſe the Sheriff was chargeable with the Value. Yelv. 44. S. C. adjudged con. but by the State of the Caſe in Yelv. it does not appear the Sheriff had paid any Part of the Money recovered. 2 Saund. 47. S. C. cited, and ſaid to have been adjudged in Yelv. con. to the other Books, and the Roll ſaid to be Paſch. 44 El. 318. 2 Saund. 345. S. C. cited, and ſaid the Roll was Paſch. 44 El. Rot. 618. 1 Mod. 31. S. C. cited, and vide 2 Rol. Abr. 591. pl. 5. and the Notes there.

3. But if upon the Fieri facias the Sheriff (e) returns, that he had ſeiſed the Goods, but Non invenit emptores, and after he is removed, and a new Sheriff made, yet the old Sheriff cannot ſell them after, tho' a Diſtringas iſſues to the new Sheriff to make the old Sheriff to ſell them; and if he ſells them thereupon, the Sale is not good, for the new Sheriff ought to ſell them. Paſch. 32 El. B. R. between (f) Dod and Conny, by two Juſtices.

(e) What is to be done after ſuch Return, vide Godb. 276. Cro. Jac. 515. Lat. 117.

(f) 4 Leon. 20. ſeems to be S. C.

4. (g) If upon a Fieri facias the Sheriff ſeiſes Goods, but before Sale a (h) Superſedeas comes to him, if the Sheriff after ſells the Goods (i) without a Writ de venditioni exponas, it is void. Paſch. 8 Car. between Scarling and King, adjudged per Curiam.

(g) Yelv. 6. L. P.

(h) Yet he ſhall not deliver back the Goods, but the Execution being begun, ſhall proceed. Charters and Peters, Cro. El. 597. by Poph. and Gawdy, Moor 542. pl. 718. for the Execution is intire and cannot be divided, but vide 2 Rol. Abr. 491. pl. 5. and the Notes there. Dyer 97. pl. 57. Yelv. 6. (i) That in ſuch Caſe a Venditioni exponas ſhall go, vide Dyer 98. b. pl. 57.

5. If a Man leases for Years, rendring Rent, the (a) Reversion may be extended upon an Elegit during the Lease, and the Tenant by Elegit shall have the Moiety of the Rent. Hill. 10 Jac. B. (b) Sir Thomas Cambell's Case resolved per Curiam.

(a) Where a Rent reserved on a Lease for Life was held not to be extendible without the Reversion. Walsal and Heath, Cro. El. 656. but vide Co. Lit. 153. a. —— That an Extent of two Parts of a Rent-charge may be good. Wotton and Shirt, Cro. El. 472. and vide 2 Rol. Abr. 472. pl. 11. and the Notes there. (b) My first Part 509. D. 4. S. C. 1 Brownl. 33.

6. If a *Fieri facias* (before the Statute) had been delivered to the Sheriff, 9 *Novemb.* and he had executed it the same Day, and after a Writ of Discharge dated the 6 *Novemb.* had been delivered to the Sheriff the same Day; if it did not appear the Sheriff had Notice of it before the Execution served, the Execution had been good. *Mich.* 37 & 38 *El.* between *Boucher* and *Wiseman*, *Cro. Eliz.* 440. *per Curiam.*

7. By the Statute of 8 *Ann. cap.* 14. no Goods or Chattels being upon any Messuage, &c. leased for Life, Years, at Will, or otherwise, shall be taken in Execution, unless the Party at whose Suit taken out shall, before Removal thereof, pay the Landlord all Rent due at the Time of the Execution, provided the same do not amount to more than one Year's Rent; and if more, then paying one Year's Rent he may proceed to execute, &c. and the Sheriff is required to levy and pay the Plaintiff, as well the Money paid for Rent as the Execution-money.

(C) In what (c) Place it may be executed.

(c) Far. 52. it was said by Holt Ch. Just. that if one be walking in Westminster-Hall, against whom there is a Judgment in B. R. the Court, upon the Desire of the Plaintiff, may, without any Writ of Execution, send an Officer to take him up. (d) Fitz. Distress 12. S. C.

1. If Land and Damages are recovered in antient Demesne, the Damages cannot be levied upon the Land held of the Manor which is Frank-fee, for it is out of the Jurisdiction. (d) 7 H. 4. 29.

2. Upon a Capias ad Satisfaciendum to the Sheriff of Middlesex to take J. S. if the Sheriff takes him and puts him into Newgate, which is the common Prison for Middlesex and London, and after another Writ of Execution comes to the Sheriff of London, tho' the Sheriffs of London are also Sheriffs of Middlesex, and Newgate, where the Prison is the Prison for both Counties, yet the Prisoner shall not be said to be in Execution upon this new Writ in London, nor can the Sheriff of London serve it upon him, for that he is in another County; for when the Commitment is to Newgate by Force of a Writ to the Sheriff of Middlesex, he cannot be said to be in any Respect within the County of London, for the Counties continue several, and the Prison several in Respect of the Commitment; for there are two several Sides, and one Partition between them. Master Parker said to me, that so it was resolved by all the Judges, upon a Reference by the Lord Chancellor out of Chancery. Pasch. 16 Jac. in one Coa's Case, Trin. 16 Jac. B. R. same Case agreed per Curiam, upon an Habeas Corpus, for the Sides are several and distinct, so in the said Case.

3. If a Man recovers against another in B. R. Debt or Damages, and he against whom the Recovery is, is in the Prison of the Fleet, he cannot be put in Execution upon this Judgment in B. R. by a special Writ to the Warden of the Fleet, to detain him

in Execution for this Debt, without (a) bringing his Body in B. R. by Habeas Corpus. Trin. 32 El. B. R. between Serjeant and Brook, said to be adjudged.

(a) But where all Actions, &c. in that Court to which removed by Habeas Corpus are discharged, the Party shall be remanded, vide Cro. Car. 128. and vide Dyer 152. pl. 6.

4. So if an Habeas Corpus be granted against the Prisoner, and the Warden of the Fleet returns, that he is languidus in Prisona, by which, &c. yet he cannot be put in Execution by a special Writ to such Purpose, without bringing his Body to the Bar de B. R. Trin. 33 El. B. R. between Serjeant and Brook held.

(D) (b) In what Cases a Man shall be in Execution before Prayer.

(b) Where the Principal surrenders himself in Discharge of his Bail, the Plaintiff ought * Fol. 895. to make his Election, whether he will take him in Execution or refuse him, of which an Entry ought to be made of Record. My first Part 675. pl. 8, 9. vide and the Notes there, and Winch 77, 78.

1. IN Debt against J. S. if the Defendant be taken upon a Latitat, and committed to the Marshal for Want of Bail, and after the Plaintiff recovers * against him, he continuing in Prison; yet he shall not be in Execution upon this Judgment before Prayer of the Plaintiff. Mich. 4 Jac. B. R. between Carr and Copping.

(c) If after Judgment against him, he surrenders himself in Discharge of his Bail, and the Plaintiff will not pray him in Execution, he shall be discharged. 1 Leon. 58.

2. If a Man recovers Damages in an Action upon the Case against J. S. in B. R. the said (c) J. S. being in Custodia Marescballi, yet he shall not be in Execution upon this Judgment, tho' it be within the Year before Prayer of the Plaintiff, for the Marshal cannot take Notice of every Judgment against every Prisoner; but upon the Prayer of the Plaintiff a Committitur shall be entered upon the Roll, and then he is in Execution. Hill. 12 Jac. B. R. between (d) Sir Hen. Bellows and Handford adjudged.

(d) Cro. Jac. 364. S. C. 1 Rol. Rep. 104, 133. S. C. adjudged, and said the Use in such Case was, to make an Entry quod committitur, and then the Marshal is chargeable with him, and not before, and vide 2 Rol. Rep. 112.

3. If a Judgment be given against J. S. who is in the Fleet a Prisoner there, and after the Warden of the Fleet informs the Court of Chancery, that the said J. S. is in his Ward of the Fleet, for certain Causes, upon which the Court commands the Warden to detain him in Execution till Satisfaction of the Judgment; yet J. S. is not in Execution upon the Judgment, because this was not at the Request of the Plaintiff, but done without his Prayer; for it may be, that he will choose another Execution, &c. Dy. 13, 14 El. B. R. 306, 63.

4. If a Man retovers in Debt, and outlaws the Defendant after Judgment, and within the Year the Defendant is taken by a Capias Utlegatum, he shall be in Execution for the Plaintiff before Prayer, because the Outlawry was (e) at the Suit of the Party. Co. 5. (f) Garnon 88. adjudged, Hill. 41 El. B. R. between Bonner and Stukely. Mich. 43, 44 El. B. R. per Curiam.

(e) And to stay the Execution of such Writ, is a good Consideration for a Promise to the Party. Jennings and Hall, Cro. El. 909. adjudged by three Judges against one. Yelv. 19. adjudged by three Judges against one. and vide 1 Leon. 51.

(f) Ante 122. pl. 4. S. C. which vide and the Notes there.

5. But otherwise it is if he be taken by Capias Utlegatum (a) after the Year, for that there he could not have a Capias against him. Dubitatur Hill. 38 El. B. R. between (b) Norton and Sharpe.

(a) Hob. 115. But vide the Case of Wolf and Davison, ante 122. pl. 7. and the Notes there.

(b) Ow. 72. S. C. Cro. El. 4. 66. S. C.

6. But if a Man recovers in Debt, and after Judgment outlaws the Defendant; and after, within the Year, the Defendant is taken by Capias Utlegatum, tho' he shall prima facie be in Execution for the Plaintiff, (c) yet he may make his Election, that he shall not be in Execution for him. Mich. 43, 44 El. B. R. between (d) Shawe and Cuttereſſe per Curiam.

(c) Moor 598. pl. 817. and vide Hob. 57. the Manner of the Entry of the Plaintiff's Prayer, to have him in Execution. 1 Rol. Abr. 902. pl. 11. S. C.

(d) Cro. Eliz. 850. S. C. and S. P.

Upon Prayer without more.

(E) In what Caſes a Man ſhall be in Execution upon Prayer before an *Habeas Corpus* ſued by *Committitur* entered.

1. If a Man recovers in Banco Debt and Damage againſt J. S. and hath Judgment, tho' J. S. be a Priſoner for other Cauſes, in the Fleet, which is the Priſon of the Common Pleas, and the Warden informs the Court thereof, and the Court commands him to detain him in Execution till Satisfaction of the Judgment, yet he is not in Execution, becauſe he was not brought to the Bar by Habeas Corpus, and viewed, and Demand made of the Priſoner, if he was the ſame Perſon who was condemned, or not, which is the Office of the Court to ask him. Dyer 13, 14 El. 306, 63.

2. The ſame Law is in Chancery. Dyer 13, 14 El. 306, 63.

3. If a Man be attainted of a Treſpaſs at the Suit of the Party in an Action of Treſpaſs, and after he is taken in Execution for the King's Fine, he, at whoſe Suit he was attainted, may pray that he remain in Execution for his Damages recovered, and he ſhall not be ſuffered to go at large before Satisfaction of them, becauſe the King comes to the Fine by his Suit. (e) 22 Aſſ. 74.

(e) Fitz. Execution 111. S. C. Br. 81. S. C.

4. The ſame Law if a Man who is attainted of a Diſſeiſin with Force be taken in Execution for the Fine of the King. (f) 22 Aſſ. 74.

(f) Fitz. Execution 111. S. C. Br. 81. S. C.

5. If a Man recovers Damages in an Aſſiſe againſt Three, and after one is taken by Capias for the King's Fine, he ſhall not be in Execution for the Recoveror upon * Prayer for the Damages, becauſe the Execution purſues the Original, which was joint, and he ought to have had an Execution againſt all jointly, and cannot have one againſt one only. 15 H. 7. 6. Curia.

* Fol. 896.

6. If an Execution by Default be awarded in a Scire facias upon a Judgment in Debt, and the Defendant, after the Year and Day, viz. four Years after was in the Fleet for another Cauſe, and by Habeas Corpus he was brought in Banco, and asked by the Court,

Court, whether he was the Perſon who was condemned ut ſupra, and he admits it, he ſhall be committed in Execution at the Prayer of the Plaintiff, as it ſeems, tho' it be after the Year and Day. Dyer 4 El. 214, 47.

7. If A. recovers againſt B. by Judgment in B. R. and thereupon B. renders himſelf to Priſon, and after brings a Writ of Error, and hath a Superſedeas, yet after upon Prayer of the Plaintiff the Court may commit him in Execution tho' the Record was removed, in as much as he had not found Bail upon his Writ of Error. Paſch. 9 Car. B. R. Symond's Caſe was ſo.

(F) In what Caſes Execution with (a) Satisfaction againſt one ſhall ſerve for the other.

(a) Tho' the Entry is **quod unica fiat executio**, yet this ſhall be intended with Satisfaction, for the Plaintiff ſhall have both their Bodies in Execution. **Blomfield's** Caſe. 5 Co. 86. b. for which, and the Books in which reported, **vide** my firſt Part 635. pl. 11. **vide**, and the Notes there.

1. IN Debt upon an Obligation againſt Two, if 5 l. Damages be aſſeſſed to be recovered of each of them ſeverally according to the Writ, if the Plaintiff ſues Execution againſt one (it is intended with Satisfaction) he ſhall not have Execution againſt the other. 14 H. 4. 19. b.

2. If a Recovery be by ſeveral Præcipe's againſt Two in Debt, upon an Obligation, in which they are bound jointly and ſeverally, if the Plaintiff ſues Execution againſt one (with Satisfaction) he ſhall not have Execution againſt the other alſo. 14 H. 4. 22. b.

3. So if one brings a ſeveral Action in one Court againſt one, and recovers, and another Action againſt the other, and recovers, if he ſues Execution againſt one, (with Satisfaction) he ſhall not have Execution againſt the other. 14 H. 4. 22. b.

4. In Treſpaſs againſt Three, if one be condemned, if the Plaintiff hath Execution againſt him with Satisfaction, he ſhall be barred againſt the other. (b) 14 H. 4. 22. Paſch. 3 Jac. B. R. between Hickman and Machin agreed.

(b) Br. Judgment 98. S.C.

5. So if for a Treſpaſs by Two, ſeveral Actions are brought againſt each in ſeveral Courts, and he recovers againſt them, yet if the Plaintiff hath Execution againſt one, it ſhall bar him againſt the other. (c) 14 H. 4. 22. b.

(c) Br. Judgment 98. S.C.

6. But in this Caſe the Plaintiff may ſue Execution againſt the other, and he is put to his Audita Querela, and by this he ſhall be helped.

7. The Law would be the ſame in this Caſe, tho' the Recovery was in the ſame Court, this being upon ſeveral Writs, for the other upon the Execution, which is laſt ſued, cannot plead the firſt Execution, and the Records are ſeveral, therefore he hath no other Remedy but an Audita Querela. Paſch. 3 Jac. B. R. between Hickman and Machin agreed.

8. If Two are bound in an Obligation jointly and ſeverally, and the Obligee recovers in B. R. againſt one, and hath him in Execution, and after recovers againſt the other in B. and upon an Elegit hath his Goods, and the Moiety of his Lands in Execution; in this Caſe by this laſt Execution, the Plaintiff is fully ſatisfied,

and therefore the other, who is in Execution by his Body, ought to be delivered by his Audita Querela. Paſch. 12 Jac. B. R. between (a) Cowly and Lydeat, adjudged per Curiam.

(a) My firſt Part 635. pl. 12. S. C.

and the ſeveral Books there cited where reported, which vide with the Notes there. Cro. Jac. 694. S. C. cited in the Caſe of Clerk and Andrews, Winch 112. S. C. cited.

9. (b) If *A.* and *B.* are jointly and ſeverally bound in an Obligation to *C.* and *A.* is ſued thereupon, and after Judgment (c) taken in Execution, and eſcapes with the Conſent of the (d) Gaoler; yet may *B.* be ſued on the Bond, and after Judgment againſt him taken in Execution, for the Eſcape was no Diſcharge or Satisfaction of the Debt. *Hill.* 16 *Jac.* between *Pendavis* and *Kenſham*, *Cro. Jac.* 531. adjudged.

(b) Cro. Car. 75. S. P. adjudged.

(c) And if both taken in Execution, and one Eſcapes, yet the other ſhall not have an Audita Querela, My firſt Part 635. pl. 11. vide, and the Notes there, and vide Moor 29. pl. 96. (d) Otherwiſe if he eſcape with the Conſent of the Plaintiff. Cro. Car. 75. adjudged.

Without Satisfaction.

(G) In what Caſes Execution without Satisfaction againſt one ſhall diſcharge the others.

Fol. 897.

1. IF a Man hath once Execution againſt the Bail of J. S. he ſhall never have Execution againſt J. S. himſelf the Principal, for he hath made his Election by the firſt Execution. Paſch. (e) 10 Jac. B. R.

(e) Higgen's Caſe, Cro. Jac. 320. his C. cited, and

Body being taken in Execution, S. C. and S. P. per Cur'. 2 Bulſt. 68. S. C. 2 Lev. 195. S. vide 1 Bulſt. 43.

2. So if he hath once ſued Execution (f) againſt the Principal, he cannot after reſort to an Execution againſt the Bail for the Cauſe aforeſaid. Paſch. (g) 10 Jac. B. R.

(f) I ſuppoſe this is intended where the Bail is taken

in Execution; for it is otherwiſe where the Bail pays Part. Folgate and Wole, 1 Sid. 107. (g) Cro. Jac. 320. S. C. and S. P. per Cur'. 2 Bulſt. 68. S. C.

3. But he may have Execution againſt one of the Bail, and after have Execution againſt the other alſo. (h) Paſch. 11 Jac. B. R. agreed.

(h) Cro. Jac. 320. S. C. and S. P. per Cur'. 2 Bulſt. 68. S. C.

4. In a *Scire facias* by the Executor of the Plaintiff, upon a Judgment againſt the Principal, the Defendant pleaded, that the Teſtator ſued Execution by *Scire facias* againſt the Bail, and had Judgment and Execution awarded againſt them; and it was held no Plea, becauſe not ſhewed the Plaintiff was ſatisfied by the Execution againſt the Bail; for otherwiſe without Satisfaction he may always charge the Bail. *Trin.* 17 *Jac.* between *Freeman* and *Freeman*, *Cro. Jac.* 545. adjudged upon Demurrer.

5. If one be Bail for *A. B. C.* and *D.* and (i) before the Return of the ſecond *Scire facias* the Plaintiff takes *A.* in Execution, yet he hath not

(i) Quære, If Recognizance not

forfeited before, and ſo not then pleadable, tho' but one Defendant, and he taken in Execution. Vide my firſt Part 676. pl. 18. and 674. pl. 1.

thereby disabled himself to take Execution against the other Principals, for the Bail undertook to bring in all Four. *Trin.* 29 *Car.* 2. between (a) *Astry* and *Ballard*, 2 *Lev.* 195. adjudged upon a *Scire facias* against the Principal for the Plaintiff *nisi*, &c. tho' *Jones* Attorney General pressed to be further heard.

(a) 2 Mod. 312. S. C. adjudged, 2 Jon. 75. S. C. adjudged, tho' by this Book it does not appear there were more than one Defendant whom the Plaintiff had taken in Execution. 1 Vent. 315. S. C. adjudged, 3 Keb. 761, &c. S. C.

(H) What Thing may be put in Execution.

The Body (b) at the Suit of the King.

(b) As to Executions at the Suit of the King, vide under Title Prerogative.

1. IF the King recovers in a Scire facias upon a Recognizance for Surety of the Peace, for Breach thereof he may have Execution by his Body, (it seems this is by the Common Law) for he cannot by the Statute. (c) 7 H. 4. 34. Curia.

(c) Br. Execution 29. S. C.

The Body at the Suit of a common Person.

(d) Ognel and Paston, Cro. Eliz. 164. S. P. adjudged per totam Curiam, that it did not lie by these Statutes, but by the Course of the Common Law and of Chancery, and that such Precedents were usual there. Moor 274. pl. 428. S. C. adjudged, 2 Leon. 84, 85. S. C. with the Argument of the Judges therein. Godb. 403. S. C. cited as adjudged, con. 8 Co. 142. S.C. cited, and said to have been resolved, that the Award of the Capias ad Satisfaciendum was erroneous, and vide ante 120. pl. 2. and the Notes there. 1 Rol. Rep. 212. 3 Keb. 221, 229. which vide with the Notes there.

2. (d) If a Man recovers in a Scire facias upon a Recognizance acknowledged in Chancery, he cannot have Execution by Capias, for the Statute of W. 2. gives a Capias in Account, and 25 E. 3. in an Action of Debt, but no Capias is given in a Scire facias. Pasch. 11 Jac. B. R. between (e) Wever and Clifford adjudged, Co. 8. Cleer's Case 142. adjudged, D. Puttenham's Case 306, 63. 27 H. 7. Kel. 100. No Capias lies upon a Recognizance in B. R. and there it is said to be so adjudged in 5 H. 7. (f) 24. but I do not find that there.

(e) Ante 120. pl. 2. S. C.

(f) In my Kelway 'tis fol. 25. but I do not find any such Opinion in the Year-Book.

(g) Gee & Ux' and Sir Francis Fane S. P. 1 Lev. 228. and vide S. C.

3. (g) A Capias lies upon a Judgment in a Scire facias upon a Recognizance acknowledged by the Bail in an Action in B. R. by the Course of the Court. Pasch. 11 Jac. B. R. M. 12. Ja. in Camera Scaccarii, between James and James adjudged, quod vide M. 12. Ja. B. 1 Sid. 329. Moor 274, 275. S. P. arguend', 2 Leon. 88. S. P. per Manwood arguendo.

(h) My first Part 498. pl. 7. S. C.

4. No Capias lies upon a Judgment in a Scire facias upon a Recognizance acknowledged by Bail in Banco, because it only binds his Goods and Land by the Recognizance, and this is in a Sum certain. Mich. 10 Car. B. R. between (h) Rigault and Carrick, where (i) an Action of Debt was brought upon the Judgment, because he could not have a Capias.

(i) That such Action will lie, vide Hetl. 129. Lit. Rep. 238.

5. So if the Bail in an Inferior Court acknowledges a Recognizance, that if the Principal does not pay the Damages and Costs reco-

recovered, or render himself to (a) Prison, tunc concedit the Damages and Costs de terris & catallis suis levari ad opus Querentis, no Capias lies upon this Recognizance, because he does not bind his Person. Hill. 10 Car. B. R. between Seaborne and Savaker, per Curiam upon Demurrer. Intratur Trin. 10. Rot. 572.

(a) This in the Original is mis-printed, for there it is Person.

6. If the Plaintiff in Detinue recovers Damages against the Garnishee, he shall not have Execution of his Body for this, because he is no Party to the Writ. (b) 7 H. 6. 45. b. adjudged.

(b) Br. Garnishee 28. S. C.

7. If an Inferior Court be held by Charter, and the Bail there acknowledges a Recognizance, no Capias lies upon this Recognizance no more than in Banco, and here can be no Custom. Mich. 15 Car. Barkely.

8. (c) If a Woman recovers Damages in a Writ of Dower, she shall not have * Execution against the Body by Capias ad Satisfaciendum, because no Capias lies in the Original. 8 R. 2. Execution 164.

* Fol. 898.

(c) 2 Leon. 84. S. P. arguend.

9. (d) No Capias lies upon a Judgment in a Scire facias against the Bail upon a Recognizance acknowledged by the Bail in B. R. upon a Writ of Error brought in Camera Scaccarii, the Recognizance being given there by Force of the Statute de 3 Jac. of Execution, for that this Recognizance is not to be guided by the Custom of B. R. but by the Common Law, and the Bail bound only their Goods and Lands, and not their Persons, and therefore no Capias lies. Trin. 18 Car. B. R. between Wildbore and others, and Priestland adjudged per Curiam, and a Superfedeas granted accordingly after a Capias granted, and the Party taken by Force thereof. Mich. 1649. adjudged accordingly per Curiam, and a Superfedeas granted. Intratur.

(d) Vide 1 Keb. 456.

10. If Costs are adjudged to the Defendant upon a Nonsuit, he may (e) have a *Capias ad Satisfaciendum* against the Plaintiff for them. *Mich.* 18 *Jac.* between (f) *Dyer* and others, and *Affincham*, *Cro. Jac.* 595. adjudged, and that it was the usual Practice as the Clerks affirmed.

(e) Vide Stat. 23 H. 8. cap. 15. That he shall have been for him

such Process and Execution for them as the Plaintiff should have had if Judgment had given; but vide this Statute with the Notes thereon. My second Part 224.

(f) 1 Rol. Rep. 212. S. C. adjudged.

By Capias.

(I) Against (g) what Person the Execution by *Capias* lies.

(g) Whether against one made a Peer pending the Action. Cro. Car. 206.

1. If a Man recovers in Trespass against a (h) Prior, he cannot have Execution by Capias against him. 21 E. 3. 59. b.

(h) Where not against an Abbot, because presumed he had sufficient by which to be distrained. Moor 768. Style 223, 253. —— Nor Bishop, whose Bishoprick was in England. Style 223.

2. Upon an Execution upon a Statute Staple, Merchant, upon the Statute of *Acton Burnel*, or 23 *H.* 8. the Body of a Peer may be taken in Execution; for by these Statutes they were not exempt. *Trin.* 29 *Eliz.* between *Harris* and Lord *Montjoy*, 2 *Leon.* 173. agreed by all the Judges.

3. It

3. It lies not upon a Judgment in Debt againſt a Peereſs, whether (a) by Birth or Marriage. *Mich.* 3 *Jac.* (b) the Counteſs of *Rutland*'s Caſe, 6 *Co.* 52. *b.* adjudged.

(a) Quære, Where one is by Patent created Counteſs for her Life, and vide Style 234, 252, 253.

(b) Moor 765. pl. 1063. S. C. adjudged.

4. (c) No Peer ſhall be arreſted (d) for Debt or Treſpaſs. *Mich.* 3 *Jac.* in the Counteſs of *Rutland*'s Caſe, 6 *Co.* 52. reſolved.

(c) 12 Co. 95. Hob. 61. S. P. —And what Writ he ſhall have for his Delivery. 4 Inſt. 126.

(d) That a Capias does not lie againſt a Peer but in Caſe of a Contempt to the Crown, Moor 767. and vide Cro. El. 170. 9 Co. 49. a. 12 Co. 95, 96. —— Whether a Capias Excommunicat' lies againſt a Peer, vide Far. 57.

Of Land.

(K) At what Time it may be ſued.

1. IF a Man recovers Damages in a Writ of Waſte, he ſhall not have Execution firſt of his Land, but the Execution ſhall be general of what he hath; and if the Sheriff returns he hath nothing, then the Execution ſhall be of his Land. 18 E. 3. 14. b.

2. If a Man be bound in a Recognizance to pay 100 *l.* at five ſeveral Days, (e) preſently after the firſt Day of Payment paſt, he ſhall have Execution for that Sum, and ſhall not tarry till the laſt Day be paſt, for that it is in Nature of ſeveral Judgments. *Co. Lit.* 292. *b.*

(e) That he may have an Elegit, and the Moiety of the Land delivered to him, and when the ſecond Day is paſt another Elegit, and have a Moiety of the Remainder, &c. for it is in Effect in Nature of ſeveral Judgments. 2 Inſt. 395.

3. If Judgment be given againſt one for Debt or Damages, or he be bound in a Recognizance, and dies, and his (f) Heir within Age endows his Mother, no Execution ſhall be ſued againſt her during his Minority. *Co. Lit.* 290. *a.*

(f) Where no Execution ſhall be ſued againſt an Heir during his Minority. Co. Lit. 290. a. but for this vide my firſt Part 259. pl. 6. 260. pl. 7. and the Notes there.

(L) At what Time it ſhall be ſued.

(g) Mod. 66. L. P.

1. (g) IN Debt, if the Defendant acknowledges the Action for Part, and for the Reſt pleads to Iſſue, upon which the Plaintiff hath Judgment for that which is acknowledged, yet he ſhall not have Execution till the Iſſue tried, becauſe he is to recover Damages for that which is acknowledged, which ſhall be aſſeſſed upon the Trial of the Iſſue. 18 H. 6. 26.

(h) Where one may releaſe that which would make Error, and for this vide ante Title Error 77, 78.

2. But if he (h) releaſes the Damages, he ſhall have Execution preſently. 18 H. 6. 26.

3. So if after the Plaintiff be nonſuit in the Iſſue, he ſhall have Execution, for now the Cauſe of the Impediment, viz. the Damages, ceaſes. 18 H. 6. 26.

4. If the Principal, after Judgment, renders himself in Court, in Discharge of his Bail, and the Plaintiff will not take him in Execution, and all is entered of Record as it ought to be, yet the Plaintiff may after take him in Execution by Capias ad Satisfaciendum; for this was but a Forbearance of him for a Time upon his own Offer, and not a Renouncing or Releasing his Execution when he sees Cause. Hobart's Reports 284.

(M) At what Time it may be.

1. (a) If a Man recovers in B. R. by Award of the Court, and thereupon the Roll is (b) signed by the Clerk for Judgment, he may have Execution there * presently before the Judgment entered, for otherwise he should be at great Delay, for the Course of the Court is not to enter the Judgment till the Vacation after, and the Defendant is not at any Mischief, for he may have a Writ of Error after the Signing, and before the Judgment entered. Mich. 15 Car. Ja. B. R. between (c) Smith and Bowles; by all the Clerks, this is the common Course of the Court.

(a) Style 229. L. P.

* Fol. 899.

(b) Where not before signed. 2 Show. 494.

(c) Ante Title Error 20. pl. 8. S. C.

Scire facias.

(N) In what (d) Cases there (e) ought to be a *Scire facias*, and (f) where Execution may be by *Fieri facias*, *Capias*, or *Elegit*, without a *Scire facias*.

1. (g) If a Man recovers Debt or Damages, and the Judgment is affirmed in a Writ of Error in another Court within the Year, yet he shall not have Execution there without a Scire facias, because the Court is changed, 20 E. 2. Execution 133. (Quære, Whether this differs from the Exchequer Chamber. 15 H. 7. 16. b.

(d) In the Case of the King there needs none after the Year. Salk. 603.

(e) Where sued after the Year and Day without a Scire facias, yet the Execution is not void, but voidable only. 3 Lev. 404. resolved by the Defendant resolved, Moor 566. pl. 772. resolved, Cro. Eliz. 706, 707. Godb. 372. cited, Palm. 448. cited, and vide there 2 Inst. 471. S. P. con. tho' said it had been otherwise holden, but common Experience and later Resolutions are so.

Far. 29, 30. Salk. 273. (f) May have it without a Scire facias where Delay arose by the Defendant's Act, as bringing Error, &c. Far. 65. (g) Garnon's Case S. P. con. 5 Co. 88.

2. (h) If a Man recovers Debt or Damages in B. R. and after, within the Year, the Defendant brings a Writ of Error in the Exchequer Chamber, where the first Judgment is affirmed after the Year expired, yet the Recoveror may have Execution by Capias, or Fieri facias within the Year after the Affirmance without a Scire facias, for the Affirmance is a new Judgment. (i) Mich. 5 Jac. in Scaccario per Curiam.

(h) Cro. El. 416. S. P.

(i) Dennis and Drake, Lan. 20. seems to be S. C. and S. P. per Cur'.

(a) But vide Palm. 449.

3. So if (a) after the Year after the Recovery the Defendant brings a Writ of Error, and the Judgment is affirmed, tho' before the Writ of Error brought the Recoveror was put to his Scire facias; yet this Affirmance is a new Judgment, and the Recoveror may have, within the Year after the Affirmance, a Fieri facias or Capias without a Scire facias. Mich. 5 Jac. Scaccario per Curiam. (b) Mich. 12 Jac. B. R.

(b) Dennis and Drake seems to be S. C. and S. P. per Curiam, and vide Lat. 193.

4. So if he be nonsuit in the Writ of Error, for tho' there is not any new Judgment given in Affirmance of the first Judgment, yet the Writ of Error revives it. (c) Mich. 12 Jac. B. R.

(c) Cro. Jac. 364. S. C. adjudged, the Writ of Error being brought in the Exchequer Chamber, and the Record remanded. 1 Rol. Rep. 104, 133. S. C. adjudged, 6 Mod. 28. S. P. the Plaintiff being delayed by the Act of the Defendant. —— But if the Execution is stayed by Injunction, tho' the Act of the Defendant, yet the Court will not take Notice thereof; besides, it would be no Breach thereof, to take out Execution, &c. 6 Mod. 28.

(d) Far. 65. S. P.

5. (d) So if the Writ of Error be discontinued, yet he that recovered is not put to his Scire facias, for the bringing the Writ of Error revived the first Judgment. Mich. 12 Jac. B. R. between (e) Sir Henry Bellows and Hanford adjudged.

(e) Cro. Jac. 364. S. C. but S. P. does not appear. 1 Rol. Rep. 104, 133. S. C. adjudged.

6. If A. recovers against B. in B. R. Damages and Costs, and thereupon hath Judgment against the Bail after a Scire facias, &c. and after B. and the Bail join in a Writ of Error upon the Statute in the Exchequer Chamber, and after the Year and Day passes; in this Case, notwithstanding this Writ of Error, the Court of B. R. may grant Execution, (f) for this is a void Writ of Error, and as if no Writ of Error had been brought, and therefore it shall be no Continuance of the first Judgment; but the Year and Day being past, the Plaintiff cannot have Execution without a Scire facias, tho' the Year passed after the Writ brought. Trin. 9 Car. between Barns and Hill adjudged per totam Curiam.

(f) That the Principal and Bail cannot join in a Writ of Error, the Judgment against them being several, &c. vide under Title Error, ante 18. p. 38.

7. There have been different Opinions, whether a *Scire facias* lay at Common Law, but this Doubt arose for Want of distinguishing between Personal and Real Actions. 2 *Inst.* 469.

(g) In the Case of Withers and Harris, Salk. 600. Holt Ch. Just. said, he was not satisfied, and therefore and therefore

8. (g) At Common Law, if after Judgment given, or Recognizance acknowledged, the Plaintiff sued out no Execution within the Year, the Plaintiff or Conusee was driven to his Original upon the Judgment, and the (h) *Scire facias* in Personal Actions was given by the Statute of (i) *Westm.* 2. *cap.* 45. which *vide* 2 *Inst.* 469, 470.

that no Scire facias lay at Common Law upon a Judgment in a Personal Action, for the Words Sive alia quæcunq; irrotulata in the Statute of W. 2. came after contractus & Conventiones, could not be construed of Judgments, but that the Law had been taken to be otherwise, he must submit. Far. 67. (h) 5 Co. 12. b. Far. 64. (i) Co. Lit. 290. b. Far. 64. 1 Sid. 351. 4 Mod. 248. 3 Mod. 189.

(k) The Reason why it lay in this Case was, for that in a Real Action one could have no other Advantage of his Judgment; but in a Personal Action Debt would lie on the Judgment. Far. 64, 66. (l) That it lay upon a Judgment in a Writ of Annuity. Salk. 258, 600.

9. (k) But in (l) Real Actions, or upon a Fine, tho' no Execution was sued out within an Year after the Judgment given or Fine levied, yet after the Year a *Scire facias* lay for the Land, &c. because no new Original lay upon the Judgment or Fine. 2 *Inst.* 470.

10. (a) If Judgment be given in Debt, and no Execution ſued out within the Year, yet the Plaintiff may (b) after enter an Award of an *Elegit* on the Roll of the Judgment, as of the ſame Term with the Judgment, and thence continue it by *Vicecomes non miſit breve, &c. Mich. 5 Will. & Mar.* between *Seymour* and *Greenvill*, *Carth.* 283. upon a Motion to ſet aſide the Execution; and tho' the Court ſaid, that an *Elegit* ought to have been actually taken out within the Year, yet being informed by the Clerks of the Court, that it had been the Practice for many Years to make ſuch Entry, *&c.* it was ſaid to be the Law of the Court, and they ordered the Execution to ſtand.

(a) 2 Show. 235. S. P.

(b) Comb. 232. it was ſaid by Sir Sam. Aſtry, that it was not the Practice to award an Elegit on the Roll, becauſe Attornies think they can have no Execution after; but it was ſaid by the Court to be a miſchievous Practice.

11. (c) If there be Judgment in Ejectment, and no Execution ſued thereon in an Year and Day, an *Habere facias Poſſeſſionem* cannot be ſued out after without a *Scire facias. Mich.* 1 *Ann.* between (d) *Withers* and *Harris*, *Salk.* 258. adjudged, and *Holt* ſaid, that as to the Poſſeſſion of the Land, an Ejectment was Real, and the only Remedy a Termor for Years had, and that a Recovery therein bound the Right and Inheritance.

(c) Comb. 250. S. P. ruled by Holt Ch. Ju. notwithſtanding the Caſe in Sid. 351. which he ſaid was not fully reported, and vide Mod. Caſes 366.

(d) Far. 64, &c. adjudged, and vide 1 Sid. 317, 351. 2 Keb. 307. 3 Lev. 100. Lutw. 1268. Skin. 161. Comb. 250. Salk. 600, 601.

12. (e) If upon a Judgment there be a *Ceſſet executio* for an Year after the Judgment, the Plaintiff within the next Year may take out Execution without (f) a *Scire facias. Mich.* 3 *Ann.* 6 *Mod.* 288. ſaid by the Counſel, and granted by the Court; and there is a *Nota*, that a *Ceſſet Executio* is never entered on the Roll.

(e) Far. 64, 65 and 6. 6 Mod. 14.

(f) It lay as well in mixt as real Actions, as upon a Judgment in an Aſſiſe. Salk. 600.

(O) In what Caſes there ought to be a *Scire facias.*

1. If a Man acknowledges a Recognizance to be paid at a certain Day above an Year from the Date of the Recognizance, the Year being paſt from the Date of the Recognizance, tho' it be within the Year after the Day of Payment, (g) yet he ſhall not have Execution without a Scire facias. 21 E. 3. 22. b. adjudged.

(g) The Words of the Statute of W. 2. are, Si recens ſit cognitio vel finis levat' infra annum, &c. and it hath been ruled, that theſe Words relate to the Teſte of the Recognizance, and not to the Day of Payment, and therefore, &c. 2 Inſt. 471. But it is after there ſaid by Coke, that he took this Rule to be againſt Law, and that Recens cognitio is as much as Recens cognitio ſolutionis, for the Words be, Statim habeat breve de executione, which he cannot have before the Day of Payment paſt. 2 Inſt. 271.

2. If a Man acknowledges a Recognizance to be paid at a Day within the Year after the Date of the Recognizance; in this Caſe he may have Execution by Fieri facias or Elegit within the Year after the Day of Payment, tho' * the Year be paſt from the Date of the Recognizance. 21 E. 3. 22. b.

* Fol. 900.

3. (h) If a Man recovers an Annuity, he ſhall have Execution for every Time which incurs after, by Fieri facias or Elegit, within the Year after the Time incurred, tho' the Year be paſt from the Judgment. 21 E. 3. 22. 1 E. 3. 3. (i) but not after the Year without a Scire facias. 21 E. 3. 22. 1 E. 3. 3.

(h) 2 Inſt. 471. S. P.

(i) Salk. 258, 600.

(a) 4. If

(a) 4 Inſt. 181. S. P. and vide Style Rep. 369.

(a) 4. If a Man be bound in a Recognizance to the King, upon Condition to be of Good Behaviour, &c. he cannot be indicted for Breach of the Good Behaviour, by which he ſhould forfeit the Recognizance without a Scire facias. Mich. 15 Car. B. R. Perrow's Caſe per Curiam, and ſuch Indictment taken in Cornwal quaſhed accordingly, and ſo two other Indictments the ſame Term quaſhed, the one againſt Smith and the other againſt Baynard; for if a Scire facias had been brought, they might have pleaded any Thing to diſcharge them.

5. If a Man be bound in a Recognizance to pay 20 *l.* yearly, at five ſeveral Days; now immediately after the firſt Day of Payment he may have an *Elegit* or *Fieri facias* for the 20 *l.* and ſo at the ſecond Day paſt, *&c.* but this is to be underſtood where the Days of Payment are expreſſed in the Recognizance. 2 *Inſt.* 471.

(b) 1 Inſt. 290. b. S. P. and vide 2 Leon. 77, 78, 87. 3 Leon. 259. 4 Leon. 44. 6 Mod. 288. 1 Sid. 59. 1 Keb. 159.

6. (b) If the Demandant or Plaintiff (c) taketh his Proceſs of Execution within the Year, tho' it be not ſerved within the Year; yet if he continue the ſame, he may have Execution at any Time after the Year. 2 *Inſt.* 471.

(c) Where that may be taken out, tho' the Defendant hath got an Injunction. Far. 288. —— How it may be upon an Elegit by Entry of an Award thereof upon the Roll, tho' none taken out within the Year. Carth. 283. and vide ſupra 331. pl. 10.

(P) In what Caſes without a *Scire facias*.

1. If a Man recovers Damages or Debt againſt B. and after B. dies, no Execution lies againſt the Executor of B. without a Scire facias. 18 E. 2. Execution 243. adjudged 15 H. 16. b.

2. If a Man recovers Debt or Damages by Judgment, and dies before Execution, his Executor ſhall not have Execution by Fieri facias or Capias, tho' it be within the Year, but ought to ſue a Scire facias. 15 H. 7. 16. b.

(d) Godb. 83. S. P. Cart. 112, 193.

3. (d) One that is no Party to the Record, Recognizance, Fine or Judgment, as the Heir, Executor or Adminiſtrator, tho' they be privy, and it be within the Year, ſhall have no Writ of Execution, but a *Scire facias* to enable themſelves to the Suit, and ſo of the Tenant or Defendant; for the Alteration of the Perſon alters the Proceſs; otherwiſe in Caſe of a Statute Staple or Merchant, becauſe the Proceſs is given by other Acts of Parliament. 2 *Inſt.* 471.

4. After Judgment in an Information on the Statute 35 *Hen.* 8. *cap.* 17. for not leaving Standils in Wood, the Informer died, and his Adminiſtrator ſurmiſed it on the Roll, and prayed his Moiety, and had it. *Morly* and *Urlin*, *Mich.* 1659. *Scaccario*, *Hard.* 161. and it was ſaid the Courſe in *C. B.* was ſo.

5. If one hath Judgment in a *Quare Impedit*, and after and before Execution the Plaintiff is outlawed, the King may have a *Scire facias* to execute the Judgment. *Mich.* 29 *El.* (e) *Moor* 241. *pl.* 378. *per totam Curiam*, who ſaid the King in this Caſe had Privity enough to ſue Execution, becauſe the (f) Thing, as it was in the Plaintiff, veſted in the King.

(e) Beverly and Cornwall, 1 Lev. 63. S. C. Goulſ. 44, 103. Cro. Eliz. 44.

(f) Where having the Thing, gives a ſufficient Privity to maintain a Scire facias. Kelw. 168, 169.

(g) For this vide Moor 367. pl. 503. Noy 150. Cart. 112, 122, 180, 193, 194.

6. (g) If there be two Plaintiffs in a Perſonal Action, and one of them dies, that ſhall not put the other to a *Scire facias*; ſo (h) if one of

(h) Pennoir and Brace S. P. 5 Mod. 339. S. P. reſolved, if a Suggeſtion of his Death be made on the Record, but not otherwiſe, becauſe then it would not be agreeable with the Record. Salk. 319. Mod. Caſes 108.

the Defendants die, becauſe the ſame Party ſtill remains on Record, in the Caſe of *Withers* and *Hains*, *Far.* 68. ſaid by *Holt* Ch. Juſt. that it had been lately ſo adjudged.

6. Where one obtained Judgment, and after had Judgment in a *Scire facias* thereupon, and then became a Bankrupt, and the original Judgment was aſſigned by the Commiſſioners to *J. S. Mich.* 7 *Will.* 3. in the Caſe of *Plummer* and *Lea*, 5 *Mod.* 88. upon Motion it was entered to intitle him to the Benefit of the Judgment in the *Scire facias* without bringing a new one.

(Q) Where after a *Scire facias*.

1. After a Judgment, if the Plaintiff within the Year ſues a Scire facias, he cannot after have a Capias within the Year, till he hath a new Judgment in the Scire facias. Trin. 13 Car. B. R. between Roberts and Piſing, per Curiam.

Scire facias.

(R) When a *Scire facias* is to be ſued, (a) how it may be, and againſt (b) what Perſon.

(a) Sciri facias for Scire facias naught. 1 Sid. 406.

(b) Where againſt Executors of Defendant and a Stranger, that enters after Judgment in Ejectment. 3 Lev. 100.

1. Upon a Recognizance, if the Conuſor be dead, a Scire facias lies againſt the Heir in general, or againſt J. S. Son and Heir of the Conuſor, (c) without ſuing againſt the Tertenants, for he ſhall not (d) have Contribution againſt the Tertenants no more than the Conuſor himſelf ſhould have. 27 H. 6. Execution 135. 18 E. 2. Execution 242.

—— Where no Scire facias againſt the Heir till Nichil returned againſt Executor. 1 Rol. Abr. 890. pl. 4. and the Notes there. (c) Tho' the Heir is charged as Tertenant. 3 Co. 13. a. —— And a Scire facias may be againſt him as ſuch, Sir Chriſtopher Heydon's Caſe, Cro. El. 896. and that the antient Courſe was ſo, vide Cro. Car. 313. (d) For this vide 3 Co. 12. b.

2. When the Conuſor is dead, and a Scire facias is ſued againſt the Heir, and he is returned dead, a Scire facias lies againſt the Tertenants. 18 E. 2. Execution 242.

(e) 3. But until it be returned, that the Conuſor being dead hath no Heir, or that the Heir is dead, or that the Heir is warned, (f) the Tertenants ſhall not be warned, becauſe the Heir may have an Acquittance. 18 E. 2. Execution 242.

(e) Cro. Car. 295, 296. 1 Jon. 319.

(f) But that a Scire facias lies againſt the Heir and Tertenant, vide Sir Chriſtopher Heydon's Caſe, Cro. El. 896. Palm. 241.

4. (g) If upon a Judgment in Debt there be a *Scire facias* againſt the Tertenants, and *A.* is returned Tenant, he may plead that (h) *J. S.* is ſeiſed

(g) 2 Vent. 194. S. P. adjudged, tho' objected ſuch Plea ought not to be admitted ſince the Statute of 16 & 17 Car. 2. cap. 5. but it was ſaid that Statute did not extend to this Caſe, for that is only where an Extent is executed.

(h) Where Plea, that another was jointly ſeiſed with him. Moor 524. pl. 693. and vide 1 Rol. Rep. 57. 2 Jon. 122. Comb. 185.

seiſed of twenty Acres of Land, which were the Defendant's at the Time of the Judgment given, and pray Judgment, whether he ſhall be put to anſwer until *J. S.* be warned. *Trin.* 11 *Jac.* between *Mitchel* and Sir *John Crofts*, *Cro. Jac.* 506. adjudged a good Plea on Demurrer, and ſaid the (a) Writ ſhould not abate, but the Defendant ſhould not anſwer till the other was warned; and it was ſaid (b) by *Houghton*, that there was a Diverſity between a *Scire facias* to have Execution upon a Judgment in Debt, and to have Execution on a Judgment in a Real Action; for in the laſt Caſe it is no Plea, for every Tenant ſhall anſwer for himſelf, and one may loſe, and the other not; but in the firſt Caſe, each ought to be contributory for his Part.

(a) Salk. 601.

(b) For this Diverſity vide Moor 571. pl. 783.

5. If there be Judgment in Debt againſt Two, and one dies, the Plaintiff reciting his Death may have a *Scire facias* againſt the Survivor only, and pray Execution againſt him; and it will be no Plea for him to ſay, the Deceaſed left Land and hath an Heir, who is living, and demand Judgment if Execution, *&c.* for the Statute which gave the *Elegit* was only at the Plaintiff's Election, and he may have Execution as at the Common Law, if he pleaſes. *Mich.* 13 *Car.* 2. between (c) *Edſor* and *Smart*, *Raym.* 26. adjudged *niſi.*

(c) 1 Lev. 30. S. C. adjudged, and ſaid, that if he had brought a Scire facias againſt both, and had Judgment thereon, he might have had a Fieri facias againſt the Survivor, or an Elegit againſt both. 1 Keb. 92, 132. S. C. adjudged, and ſaid, that by taking Advantage of the Perſonal Lien only, he had waived the Benefit of an Elegit againſt the Heir. —— But a Scire facias does not lie againſt the Survivor and Executors of the Deceaſed, becauſe the Perſonal Charge ſurvives, 3 Keb. 928. and vide Caſe of Lady Harvy and Norton. 2 Saund. 50. Ray. 153.

6. If there be a Judgment in Debt againſt *A.* and *B.* one *Scire facias* will not lie thereon againſt the Heir of *B.* and another againſt *A.* for the *Scire facias* ought to purſue the Judgment, and that being joint, ſo ought the *Scire facias* to be; for otherwiſe there would be ſeveral independent Suits. *Trin.* 1 *Will. & Mar.* between (d) *Panton* and *Hall*, *Salk.* 598.

(d) Carth. 105. S. C. Skin. 82. Mod. 199.

(S) The Goods of whom may be taken in Execution.

1. IF a Man recovers Damages againſt a Corporation, he ſhall (e) not have Execution of the Goods of ſingle Men in their natural Capacity, but of the Goods of the Corporation. 8 H. 6. 1. 19 H. 6. 64. b. 20 H. 6. 9. 26 H. 6. Execution 128.

(e) Yet in Style 367. it was ſaid by Rolle Chief Juſtice, that if a Sum of Money be to be levied on a Corporation, it may be levied on the Mayor, or any Perſon being a Member of the Corporation; but Quære, if this muſt not be intended of the Goods of the Corporation in their Hands. —— A Collector of Fifteenths might have levied all the Tax within one Townſhip on the Goods of one Inhabitant only, who ſhould have had the Aid of the Court of Exchequer, to make each other Inhabitant contributory. Lan. 65. per Tanfield Chief Baron.

2. So if a Corporation be fined, this ſhall be levied of the Goods of the * Corporation, and not of the Goods of every particular Man. 9 H. 6. 36. b.

* Fol. 901.

(T) What Thing will discharge a Man out of Execution.

1. IF a Man in Execution for Debt at the Suit of J. S. is (f) attainted of Felony, and after pardoned, (g) this shall not discharge him out of Execution. Mich. 10 Car. B. R. Chappel's Case per Curiam.

(f) Where such Person shall be charged in Execution, vide postea under this Title Execution. 84. Sav. 63.

(g) Ognel and Waston, Cro. El. 164. Yelv. 42. Moor 274. pl. 428. 2 Leon.

After Execution.

(U) In (h) (i) what Cases an Execution may be after an Execution.

1. IF a Man be condemned for a Fine to the King, and Damages to the Party in an Action where a Capias lies in the Original, and he is taken by Capias pro Fine at the Suit of the King, and after suffered to escape; yet the Party, at whose Suit the Recovery was, may have Execution by Fieri facias or Elegit, (k) tho' he may, if he will, make it an Escape as to him, and charge the Sheriff, for he was in Execution for him at his Election. 18 H. 6. 19.

(h) If the first Execution be reversed, there is no Record thereof, and a new Execution may be granted. Fish and Wiseman. Godb. 372. Latch 193. Palm. 448.

(i) Where after Possession delivered by the Sheriff, the Defendant enters again, an Attachment lies; but if the Habere facias, &c. be not returned, a new Writ may be, upon Motion, awarded. 2 Brownl. 216, 253. 1 Sid. 224. 6 Mod. 27, 115. Palm. 289. 2 Leon. 13. Godb. 82, 83.

(k) Ante 122. pl. 1, 3, 4. vide, and the Notes there.

2. If A. is chargeable to the King for 27 l. for an Amercement, for which Process issues out of the Exchequer to the Sheriff to levy it, and his Under-sheriff comes to A. upon another Occasion, and A. says to him, You owe me 30 l. by Bond, I pray pay me, to which the Under-Sheriff says, You owe me 27 l. for an Amercement, which I ought to levy by Process, which I have; and if you will give me my Bond, I will discharge you of your Amercement, and pay you 3 l. to which A. agrees, and delivers the Bond accordingly; this is a good Execution, and the Amercement well levied in Law, so that A. shall not be charged again by the King, but the Sheriff. Mich. 8 Jac. Scaccario, (l) Sir Daniel Norton's Case adjudged.

(l) Lane 74. S. C. adjudged.

3. If a Man be taken by a Capias ad Satisfaciendum, he is presently in Execution upon the Arrest before the Day of the Return of the Writ. Dubitatur Kellway 12 H. 7. 2. b.

(m) After an (n) Escape.

(m) Vide post under this Division.

(n) How and when to be taken upon Escape-Warrant, vide 1 Ann. cap. 6.

4. If a Man taken in Execution by a Capias be put in Prison, and after Escapes, and after the Sheriff dies, a (o) new Capias lies against him, for otherwise the Plaintiff is without Remedy. (p) 41 Ass. 15. adjudged.

5 Ann. Stat. 2. cap. 9.

(o) That Debt upon the Judgment lies not, My second Part 500. pl. 6.

(p) Br. Execution 86. S. C.

5. If

5. If a Man in Execution escapes, and the Sheriff makes fresh Pursuit after him, and after takes him again, tho' it be a long Time after, yet he shall be said in Execution again, for that he shall not take Advantage of his own Wrong. Co. 3. Ridgewaie 52. resolved. Dubitatur 12 H. 7. Kelleway 2. b.

6. So if a Man upon a Capias ad Satisfaciendum be taken in Execution, and after rescues himself from the Sheriff, and escapes, the Plaintiff may have a new Capias against him, and take him again, (a) the first Writ not being returned. Pasch. 8 Car. B. R. between Sir Robert Mounson and Clayton adjudged per Curiam upon a Scire facias after the Year, because he shall not take Advantage of his own Wrong. Intratur Trin. 7 Car. Rot. 1343. P. 7 Jac. B. between Rodford and Hopkins per Curiam agreed, Co. 3. Ridgeway 52. b. (b) contra 14 H. 7. 1. per Curiam, contra (c) 41 Ass. 15.

(a) So where after an Escape he was taken again and brought in Court upon a Capias ad Satisfaciendum; and because the Plaintiff intending to charge the Sheriff would not pray him in Execution, he was discharged, and not left in Custody of the Sheriff, he not praying it. 1 And. 118. (b) Br. Execution 58. S. C. (c) Br. Execution 86. S. C. but vide.

7. So in the said Case, if the Sheriff had returned the Writ and the Rescue, the Plaintiff might have had a new Capias against him for the Cause aforesaid. Pasch. 8 Car. B. R. in the said Case per Curiam agreed.

Fol. 902.

8. If A. be in Execution at the Suit of B. and escapes with the Assent of the Sheriff, and after the (d) Sheriff retakes him and keeps him in Prison, he shall be in Execution to B. for tho' B. may bring an Action against the Sheriff for this voluntary Escape, yet this is at his Election, (e) for the Party in Execution by his own Wrong shall not put B. to his Action against the Sheriff against his Will, and perhaps the Sheriff may not be able to give him Recompence. Hill. 10 Car. B. between (f) Trevillian and Lord Roberts, Rot. 1622. Where an Audita Querela was brought upon this Surmise, and Issue taken upon the voluntary Escape, and found for the Plaintiff, and yet adjudged in Arrest of Judgment against the Plaintiff, contra Hobart's Reports 273. The Sheriff of Essex's Case.

(d) That the Plaintiff may notwithstanding have a new Execution, for it shall not be in the Power of the Sheriff (who may be a Person insolvent) to deprive the Plaintiff of his Execution. 2 Jon. 21. adjudged, 1 Vent. 4. (e) So if Two are taken in Execution, and one escapes, the other shall not have an Audita Querela; My first Part 635. pl. 11. (f) My first Part 633. pl. 4. S. C. which vide with the Notes there; and vide ante 118. pl. 13. 1 Vent. 4. 269. 2 Lev. 109, 132. 2 Jon. 21. 1 Mod. 194. 1 Show. 174. 1 Sid. 330. Cart. 212, 213. 1 Lev. 211. Lutw. 1266.

9. If a Man in Execution in the County of Devon escapes into the County of Somerset, where he is taken in Execution, and after the Sheriff of Devon upon fresh Suit finds him in Prison in Somerset; Quære how he may charge the Sheriff of Somerset with the first Execution, or put the Party in Execution, in as much as he cannot retake him.

After Execution.

10. If a Man be imprisoned for the King's Fine, and after there is an Agreement between the Prisoner and the Plaintiff, and the Plaintiff suffers him to go at large after the Fine paid, upon a Recognizance made for the Duty to the Plaintiff, if the Defendant does not pay the Duty, the Plaintiff may sue Execution upon the Condemnation, or upon the Recognizance at his Pleasure, for he was not in Execution at his Suit at his Election. (g) 21 E. 4. 67. b.

(g) Vide the Year-Book, for I doubt, whether the Words At his Election, should not have been omitted by Rolle.

11. If a Man recovers Debt against B. who is after taken upon a Capias Utlegatum within the Year, and put in Prison, (a) tho' he be in Execution primâ facie, yet the Party may elect, that he shall not be in Execution thereby for him, and so have a new Execution by Capias, tho' the Sheriff suffers him to escape upon the Capias Utlegatum, for he was never in Execution by this at his Election. Mich. 43, 44 El. B. R. between (b) Shawe and Cuttereſſe, will prove this, contra Hill. 7 Jac. B. admit Curia.

(a) Ante 122. G. 1, 2, &c. vide ſeveral Caſes, and the Notes there; and vide Yelv. 19. — Where upon the Return of a Capias ad Satisfaciendum, the Body being in Court, the Plaintiff would not pray him in Execution, and therefore he was diſcharged. 1 And. 118. (b) Cro. El. 850. S. C.

12. If a Man in Execution at the Suit of the Party ſues a Writ of Error, and finds Mainprize by Recognizance to ſue with Effect, if the Judgment be affirmed, the Plaintiff ſhall not have further Execution, becauſe he had Execution before, but he ought to ſue Execution upon the Recognizance. 21 E. 4. 67. b.

13. If a Man in Execution ſues a (c) Scire facias upon a Deed, and the Party lets him out by Recognizance, if it be found not his Deed that recovered, he cannot have Execution again, but upon the Recognizance. 21 E. 4. 67. b.

(c) How Execution may be ſued upon a Judgment againſt the Plaintiff in an Audita Querela. 1 Sid. 14. b. but for this vide my firſt Part 643. pl. 1. and the Notes there.

14. If a Sheriff (d) (e) levies Goods by Force of a Fieri facias, and does not deliver them to the Party, nor return his Writ, the Plaintiff may have a new Fieri facias, for that a Record ſhall not be avoided by a naked Matter in Fact. Paſch. 7 Jac. B. Warburton, ſaid to be adjudged Paſch. 1 Jac. B. per Curiam.

(d) That the Defendant is diſcharged by the Money being levied, tho' the Writ be not returned, vide my ſecond Part 495. pl. 17. and the Notes there. —— And may plead it to a Scire facias in Bar of Execution. Moor 468. pl. 671. March 14. 1 Jon. 430. Cro. Car. 539. Goulſ. 170. Cro. El. 208. 1 And. 247. 2 Rol. Rep. 57. Godb. 276. Cro. Jac. 514. Hob. 207. Hut. 32. 2 Show. 79, 281. 2 Saund. 343. That there can be no ſecond Execution granted out before the firſt returned. March 47. —— That the ſecond ought to recite the Firſt, and what done thereon. Hob. 58. Salk. 318. but vide Style 255. (e) So Payment to the Sheriff is good. Taylor and Beton, 2 Lev. 203. 2 Jon. 97. 3 Keb. 748. —— But not to the Gaoler. 2 Lev. 203. 2 Jon. 97.

15. If a Man, before he is in Execution, finds Bail upon a Writ of Error, and after the Judgment is affirmed, the Plaintiff may have an Action upon the Recognizance, or Execution upon the Record. 21 E. 4. 67. b.

16. If a Man in Execution upon a Statute Merchant or Staple, ſues an Audita Querela, and thereupon finds Mainprize, and after does not proſecute it, or it is adjudged againſt him; it ſeems by the Statute 11 H. 6. cap. 5. that he may be taken in Execution again.

17. If a Man in Execution be bailed by the Court, yet he may be after taken in Execution again. Paſch. 13 Jac. B. R. per Coke.

Fol. 903.

18. If A. recovers againſt B. and hath an Execution de bonis teſtatoris ſi non de bonis propriis, and the Sheriff upon a Fieri facias levies the Money, and after upon another Fieri facias to him directed returns a Devaſtavit, and thereupon a Scire facias is granted againſt B. to ſhew Cauſe, &c. B. may diſcharge himſelf of this Devaſtavit by Plea, that the Sheriff levied the Money upon the firſt Fieri facias. Trin. 11 Car. B. R. between Middleton and Powel, per Curiam.

19. If a Man impriſoned upon a Capias pro Fine ſues a Writ of Error, and thereupon he is bound by Recognizance to the Plaintiff to proſecute it with Effect, and alſo if the Judgment be affirmed, that he ſhall render himſelf to Priſon again; this is a good Condition. 11 H. 7. 15. dubitatur.

After Delivery by Parliament.

20. If the Defendant in (a) an Account be adjudged to account, and after committed to Prison by the Auditors for not making a perfect Account, and after he is delivered out of Prison by Privilege of Parliament, because he is a Burgess of Parliament; yet after the Parliament ended, he may be taken again by a special Writ, reciting the Special Matter, and committed to Prison to remain there as he was before. Mich. 4 Jac. B. R. between Sir Thomas Egerton and Brereton adjudged.

(a) By the Stat. 1 Jac. 1. cap. 13. if one taken in Execution be delivered by Privilege of Parliament, as soon as Privilege ceaseth, a new Execution may be sued out against him.

After Death in Execution.

21. If a Man recovers against Two, and takes one in Execution, who dies in Execution, (b) he may after take the other in Execution, for he might before the Death have taken him also in Execution, and the Death cannot alter it. Mich. 4 Jac. B. R. between Williams and Curtis, per Fenner and Tanfield, 5 Co. 87. Pasch. 24 El. between (c) Jones and Williams, adjudged P. 25 El. B. R. Rot. 429. between (d) Hawkyn and Ardyn, if one be taken in Execution, and after the other is sued upon the same Obligation, and he pleads it in Bar, yet adjudged upon Demurrer no Plea, viz. that the Death of the other in Execution is no Satisfaction. Master Hodgson, an Attorney de B. R. told it me, and gave me the Number of the Roll thereof.

(b) For this vide in the Case of Shaw and Cutteres. Cro. El. 850. and vide Dal. 58.

(c) Johns and Williams S. C. cited in the Case of Shaw and Cutters. Cro. Eliz. 851. 5 Co. 86. Cro. Jac. 136, 143. 159. Lit. Rep. 325.

(d) 5 Co. 87. a. S. P. resolved, con. Hetl.

22. If a Man recovers against J. S. and takes him in Execution by Capias, and after J. S. dies in Execution, no new Execution lies against his Executors or Administrators. 33 H. 6. 48. 7 H. 6. 7. Trin. 13 Jac. B. between (e) Foster and Jackson per Curiam, adjudged upon solemn Argument, vide same Case, Hobart's Reports 82. and there cited 85. between (f) Williams and Curtis, adjudged Mich. 43 El. B. R. between Shawe and Cutteres per Curiam, contra Blumfield Co. 5. 86. b. resolved, 47 E. 3. Execution 41.

(e) Moor 857. pl. 1177. S.C. Hob. fol. 52. S. C. with the Argument at large.

(f) Cro. Jac. 136, 143. S. C. adjudged.

23. If a Man recovers in Debt against J. S. and after outlaws him upon the Judgment, and after J. S. within the Year is taken by a Capias Utlegatum, and after J. S. dies in Prison before any Prayer made by the Recoveror, that he should be in Execution at his Suit, yet this is not any Satisfaction of the Debt, but his Executor or Administrators may be charged for it; for he was in Execution by the Taking upon the Capias Utlegatum, for the Party prima facie, at the Election of the Party, but this was only at his Election. Mich. 43, 44 El. B. R. between (g) Shawe and Cutteres per Curiam.

(g) Cro. El. 850. S. C. adjudged, and the Writ was Ad recipiendum, quod Curia Consideraverit, and tho' the Plaintiff sued it out, yet it is not any Election in him to have the Party in Execution till he prays it.

24. If upon a Recognizance before the Chief Justice, according to the Form of the Statute, the Conusor be taken, and with the Consent of

the Sheriff eſcapes; yet his Goods and Lands may be extended; for the Eſcape, and the Action which the Plaintiff hath againſt the Sheriff, are no Satisfaction of the Debt. *Paſch.* 34 *El.* between (a) *Lynacre* and *Rodes*, 1 *And.* 266. adjudged upon an *Audita Querela.*

(a) 1 Leon. 230. S. C. and ſaid by Anderſon Ch. Juſt. and the Diverſity was, where he went at large with the Conſent of the Sheriff, and where of the Plaintiff. 2 Leon. 96. S. C. adjudged, 5 Co. 86. b. and vide my firſt Part 634. pl. 4. and the Notes there.

25. By the Statute 21 *Jac.* 1. *cap.* 24. (reciting the Doubt which before was) it is explained, declared, and enacted, That after the Death of one charged in Execution for Debt or Damages, the Party at whoſe Suit charged, his Executors or Adminiſtrators may ſue out a new Execution againſt the Lands and Tenements, Goods and Chattels, or any of them, of the Perſon ſo dying, in like Manner as if he had never been taken or charged in Execution.

26. Provided, this Act ſhall not enable any to ſue Execution of Lands *bonâ fide* ſold by the Defendant after Judgment for the Payment of any of his Creditors, the Money for which ſold being paid, or ſecured to be paid to any of his Creditors, with their Privity and Conſent, in Diſcharge of his or their Debts, or ſome Part thereof.

(X) (b) What Execution may be after another.

Fol. 904.

(b) Sir William Cave and Sir William Fleetwood, Hetl. 159. Lit. Rep. 325.

After a *Capias* or *Fieri facias.*

1. After a Fieri facias prayed of Record he may have an Elegit, contra 27 E. 3. 89 b.

2. After a Fieri facias returned nihil, an Elegit lies. (c) 30 E. 3. 24.

(c) Fitz. Execution 126. S. C.

3. After a Fieri facias he may have an Elegit. 15 H. 7. 15. (d) 47 E. 3. 26. b.

(d) Fitz. Execution 123. S. C. Br. Execution 128. S. C. Br. Elegit 5. S. C.

4. So after a Fieri facias he may have a Capias. 15 H. 7. 15. (e) 21 H. 7. 19. b.

(e) Br. Execution 72. S. C.

5. (f) If a Man recovers Debt againſt B. and levies Part of the Debt by a Fieri facias, which is returned, yet he may take the Body of B. in Execution by a Capias for the Reſidue of the Debt. Mich. 4 Jac. B. R. between Carr and Copping per Curiam reſolved.

(f) Wells and Denny, Moor 598. pl. 819. S. P. adjudged, and vide Hetl. 159. Lit. 325.

6. (g) If Two are bound jointly and ſeverally, and Judgment given againſt them upon (h) ſeveral Precipe's, the Plaintiff ſhall not have a Fieri facias againſt one, and a Capias ad Satisfaciendum againſt the other, but ought to have but one Manner of Execution againſt both. Mich. 11 Jac. B.

(g) For this vide 1 Rol. Abr. 888. N° 1, 2, &c. and the Notes there.

(h) 1 Leon. 288. vide,

7. If a Capias ad Satisfaciendum be awarded, tho' the Sheriff returns a Non eſt inventus, yet he ſhall not have another Execution after. 20 E. 2. Execution 132.

8. If

8. If a Man recovers Debt or Damages againſt B. and after B. is put in Execution for it upon his Prayer, he ſhall not after have an Elegit or Fieri facias againſt him for it. (a) 22 Aſſ. 43. 47 E. 3. Execution 41. he ſhall not have an Elegit.

(a) Br. Treſpaſs 79. S. C.

9. If a Man recovers a Debt againſt B. and after B. is taken in Execution by Force of a Capias ad Satisfaciendum, the Plaintiff hath determined his Election, ſo that he cannot after have an Elegit or Fieri facias. Mich. 43, 44 El. B. R. per Curiam.

10. If A. be taken in Execution upon a Capias ad Satisfaciendum at the Suit of B. and eſcapes from the Sheriff, and no Return is made of the Writ, nor is it filed, nor any Record made of the Award of the Capias, B. may have a Scire facias againſt A. upon the Judgment, and ſo after have an Elegit, or any other Writ. Paſch. 8 Car. B. R. between Sir Robert Mounſon and Clayton, adjudged upon Demurrer.

11. So if A. be taken in Execution upon a Capias at the Suit of B. and eſcapes from the Sheriff, and all this is pleaded and confeſſed upon a Demurrer; but it is not pleaded, that the Capias was filed or returned, B. may have a new Scire facias againſt A. to have Execution, and ſo after have an Elegit or other Writ. Paſch. 8 Car. B. R. between Sir Robert Mounſon and Clayton adjudged upon Demurrer, which Intratur Trin. 7 Car. Rot. 1343. I my ſelf de conſilio Defendentis.

12. If a *Capias ad Satisfaciendum* is awarded to the Sheriff againſt *A.* and he thereupon makes out a Warrant to a Bailiff of a Liberty *ad capiendum* A. *ad reſpondend'*, *&c.* who returns the Precept ſerved, and the Sheriff returns *Cepi Corpus ſecundum exigentiam Brevis*; tho' the Sheriff by the Return hath charged himſelf, yet in as much as *A.* was never taken in Execution, the Plaintiff may take out a new Proceſs againſt the Defendant. *Mich.* 2 *Jac.* between *Wood* and *Harburn*, *Telv.* 52. adjudged.

(Y) What Execution may be after another.

(b) After an *Elegit*.

(b) Where Lands, of which Defendant was only ſeiſed in Right of his Wife, * Fol. 905. are delivered upon an Elegit, and Defendant dies before the Debt is ſatisfied, ſuppoſing the Defendant hath other Lands, whether the Plaintiff may have a new Elegit. 2 Sid. 17. is made a Quere. (c) Quere if nothing done thereon. Moor 545. pl. 724. —— Where Land ſhall not be intended to be delivered thereon, if not ſo pleaded. Glaſcock and Morgan, 1 Lev. 92. 1 Sid. 184. 1 Keb. 692. (d) Hob. fol. 57. S. C.

1. If a Man prays an Elegit, and it is entered of Record, (c) he cannot after reſort to another Execution, becauſe he hath made his Election. 19 H. 6. 4. b. Trin. 15 Jac. B. R. between Andrews and Cope per Curiam; and by * the Clerks de B. & de B. R. that this is all the Courſe within the Year after the Prayer. Contra Hobart's Reports in Foſter and Jackſon's Caſe (d) 79.

2. If a Man recovers in B. Debt or Damages, and prays an Elegit, which is entered of Record, and after the Record is removed in B. R. by Writ of Error, where the Judgment is affirmed within the Year, the Plaintiff may have Execution in B. R. by Capias or Fieri facias, becauſe this is another Court than that in which he had made

made his Election before. Trin. 15 Jac. B. R. between (a) Andrews and Cope, adjudged per Curiam præter Dodderidge, who seemed econtra.

(a) Clerk and Andrews, Cro. Jac. 693. seems to have been the S. C. but S. P. does not appear.

3. (b) If a Man sues an Elegit, and it is returned nihil within the Year, he shall have a Capias after, or a Fieri facias within the Year. Trin. 15 Jac. between Andrews and Cope agreed per Curiam, and the Clerks de B. and de B. R. who said, that this is their common Course, to have it within the Year after the Prayer. Mich. 15 Jac. B. It was so agreed per Curiam in the same Case, Hobart's Reports (c) 79. 47 E. 3. Execution 41. upon an Elegit returned, that he had but two Marks of Rent, and held, that he might have the Advantage which was at Common Law (it seems a Fieri facias) and so it is there held, if he had not Execution of the Damages upon the first Writ (it seems by this, that it is intend that a Nihil is returned) he may have a new Writ, contra (d) 30 E. 3. 24.

(b) Palmer and Knowles S. P. 1 Leon. 176. adjudged, Cro. El. 160. adjudged.

(c) Hob. fol. 57. S. C.

(d) This seems to be S. C. as mentioned Hob. 57. which he said he found not, but vide Fitz. Execution 126. S. C.

4. If a Man prays an Elegit, and it is entered of Record in B. and after takes out the Writ, and before the Return thereof the Record is removed in B. R. where the Judgment is affirmed within the Year, and after it is affirmed to the Court, that the Sheriff had returned his Writ in B. served, yet the Plaintiff may have a Capias, because this Allegation does not appear to the Court; and now it is impossible that it can be returned here, and so it is stronger than if a Nihil had been returned. Trin. 15 Jac. B. R. between (e) Andrews and Cope adjudged per Curiam, præter Dodderidge, who seemed econtra for the Election on the Roll.

(e) Clerk and Andrews, Cro. Jac. 693. seems to have been S. C. but S. P. does not appear.

5. If a Man sues an Elegit, and thereupon (f) certain Goods are taken in Execution, and sold for Part of the Debt, and it is returned, (g) yet he may have a Capias after; for now this is in Effect but a Fieri facias, no Land being extended, and so it is but a Nihil for the Land. Hobart's Reports 81.

(f) Where Term delivered upon an Elegit, which would not satisfy the Judgment, and Capias or other Writ lay before 32 H. 8. 2 Sid. 17.

(g) Whether he may not have Debt or a new Elegit for the Residue, vide my second Part 500. and Glascock and Morgan, 1 Lev. 92. 1 Sid. 52, 184.

6. If a Man sues an Elegit upon a Recovery, and the Sheriff returns that he hath made Partition of the Lands of the Defendant by twelve Jurors, but he cannot deliver the Moiety to the Party according to the Writ, because all the Land is extended by another upon a Statute, he may after have a Capias ad Satisfaciendum, for this Return is all one with a Nihil returned, for it does not appear by the Return when the Plaintiff shall have Execution, nor can the Plaintiff have any Benefit by this Writ of Elegit, for after the Extent ended, he ought to have a new Elegit, and not a Levari facias. Mich. 31, 32 El. B. R. between (h) Palmer and Knowles adjudged.

(h) 1 Leon. 176. S. C. adjudged. Cro. Eliz. 160, adjudged.

7. If a void Elegit be filed, yet after the Year he may have a new Elegit. Mich. 10 Jac. B. R.

8. If the Sheriff upon an *Elegit* delivers a Moiety of certain Lands to the Plaintiff, who accepts them, he ſhall not after have a new *Elegit* upon a Suggeſtion, that the Defendant had other Lands in the ſame County, for the Record was ended, and the Attornies of both Sides out of Court. *Mich.* 35 *El.* between (a) *Hanger* and *Fry*, *Cro. Eliz.* 310. *per Curiam.*

(a) Moor 341. pl. 462. S. C. but differs in the Report.

9. But if he comes the firſt Day the Extent is returned, and waives it, and upon ſuch Suggeſtion prays a new Extent, he may have it, becauſe he never accepted the firſt. *Mich.* 35 *Eliz.* between (b) *Hanger* and *Fry*, *Cro. El.* 310. adjudged.

(b) Moor 341. pl. 462. S. C. but differs in the Report, and ſaid, that Goods may be taken upon the ſecond Elegit, tho' Land extended on the Firſt, and nichil returned as to Goods, and vide my ſecond Part 629. pl. 6. Cro. Jac. 338, 339.

In what Caſes it may be by Entry, (c) &c.

1. (d) In all Caſes where the Writ demands Land, Rent, or other Thing in certain, the Demandant after Judgment may enter or diſtrain before any Seiſin delivered to him by the Sheriff. *Co Lit.* 34. *b.*

(c) Upon a Recovery of a Reverſion, Common, &c. that lie in Grant, the Recoveror is not in Poſſeſſion till Execution, Entry, or Claim. 1 Co. 94. a. b. 97. b. 106. b. Moor 141. Kelw. 108. My firſt Part 581. pl. 4. (d) 1 Rol. Rep. 322.

2. (e) But in Dower where the Writ demands nothing in certain, the Demandant, after Judgment, cannot enter or diſtrain till Execution ſued, upon which the Sheriff delivers the third Part in certain. *Co. Lit.* 34. *b.*

(e) My ſecond Part 665. S. 1, 2.

3. So where the Wife of one Tenant in Common demands the third Part of a Moiety, ſhe cannot, after Judgment, enter till the Sheriff hath delivered her the third Part, tho' it is thereby reduced to no more Certainty than it was. *Co. Lit.* 34. *b.*

4. If one recovers in an Aſſiſe, or Aſſiſe of *Mortdanceſtor*, he may enter and execute the Judgment without being put in Seiſin by the View of the Jury. *Paſch.* 5 *Eliz. Moor* 54. *pl.* 156. *per Dyer* and *Welſh*; but it was ſaid in this Caſe, that if he be again diſſeiſed, he ſhall not have a *Rediſſeiſin* but a *Poſt-Diſſeiſin.*

Who may be charged therewith.

Criminal or Perſon attainted.

1. If a *Capias ad Satisfaciendum* is delivered to a Sheriff againſt one he hath in his Cuſtody, and he is charged therewith, (f) he is thereby in Execution, for he ſhall not take Advantage of his own Wrong; and tho' he is after diſcharged of the Felony, and eſcapes, the Sheriff ſhall anſwer for the Eſcape. *Mich.* 31 & 32 *Eliz.* between (g) *Ognel* and *Paſton*, *Cro. Eliz.* 164. adjudged.

(f) A Priſoner for Criminal Matters ought not, without Leave of the Court, to be charged with Civil Actions; but if charged in Execution, ought not to be diſcharged. Ray. 58. 1 Sid. 90. and vide Truſſel's Caſe, Ow. 69. 1 Leon. 326. Cro. El. 516. 1 Lev. 125, 146. Comb. 40. (g) Moor 274. pl. 428. S. C. where it is ſaid, he was after found guilty of the Felony, 2 Leon. 84. S. C. adjudged, and ſaid he was after found guilty of the Felony. Sav. 63. S. C. adjudged, by which Book he was found guilty of the Felony, and before the Execution ſued out, Judgment given that he ſhould be hanged. Yelv. 42. S. C. cited. —— For notwithſtanding the Attainder, his Body remained ſubject to Arreſts and Execution; and vide Truſſel's Caſe, Ow. 69. 1 Leon. 326. Cro. El. 516. and vide ante 1 Rol. Abr. 901. T. and the Notes there.

At Common Law.

How, and by what Writ.

1. (a) The (b) Body or Lands of the Defendant were not at Common Law liable to an Execution upon a Recognizance or Judgment for Debt or Damages, unleſs in ſome (c) Special Caſes. 3 *Co.* 11. *b.*

(a) 2 Inſt. 394. 1 Brownl. 118.

(b) But the Body and Lands of the King's Accountant were at Common Law liable to the King's Execution, 3 Co. 12. b. but for this vide under Title Prerogative. (c) As upon a Judgment againſt an Heir, 3 Co. 12. a.

2. But at Common Law the Execution was only of his Goods, Chattels, Grain, and other preſent Profit growing on his Land. 3 *Co.* 11. *b.*

3. (d) For this Purpoſe the Common Law gave two Writs only, as the *Levari facias*, by which the Sheriff was commanded *quod de terris & catallis ipſius* A. *&c. Levari facias, &c.* and the *Fieri facias, &c.* which was only *de bonis & catallis, &c.* 3 Co. 12. a.

(d) Hob. 56.

4. (e) The Common Law abhorred Force, and when committed, the Body of the Offender was ſubject to Impriſonment; and it was a Rule, That in all Actions (f) *Vi & Armis* a *Capias* lay, and where a *Capias* lay in Proceſs, there after Judgment a *Capias ad Satisfaciendum* lay, and the King might have a *Capias pro Fine.* 3 Co. 12. a.

(e) Co. Lit. 290. b. 2 Inſt. 394. Hetl. 159. Lit. Rep. 325.

(f) This muſt be intended where there was a direct and wilful Wrong, not where a Negligence only, as againſt an Hoſt for Goods loſt in an Inn. Hob. 56.

Executions by the Common Law.

(g) Levari facias, and (h) Fieri facias.

1. The Sheriff, upon a *Fieri facias*, cannot (i) deliver the (k) Goods of the Defendant to the Plaintiff, in Satisfaction of his Debt. *Mich.* 37 & 38 *Eliz.* between (l) *Thompſon* and *Clerk*, *Cro. El.* 504. adjudged.

(g) F. N. B. 265.

(h) Where a Sheriff after a Fieri facias delivered to him pays the Plaintiff out of his own Money. Hob. 207. it is made a Queſtion by Hobart, whether the Sheriff may levy the Money on the Defendant. (i) Tho' they cannot be delivered to the Plaintiff, they may be ſold to him. Comb. 452. ſo held. (k) For the Money levied, but it ought to be brought into Court, for it is not of Record without. Godb. 147. —— But the Law ſeems otherwiſe, for tho' the Writ be Ita quod habeas, &c. yet the Sheriff may return, that he hath paid the Money to the Plaintiff. 2 Show. 87. 3 Lev. 204. (l) Noy 56. S. C. and S. P. per Fenner, 2 Vent. 95. S. C. cited.

2. If a Sheriff, reciting, that the Defendant hath a Term of Years, ſells it by Virtue of a *Fieri facias*, this Sale is good, for it cannot be intended that the Sheriff ſhould certainly know the Beginning and End of the Term. *Hill.* 39 *Eliz.* (m) *Palmer*'s Caſe, 4 *Co.* 74. *a.* and the Caſe of Sir *George Sydenham* and *Rolls* cited to prove it.

(m) Cro. Eliz. 584. S. C. and S. P.

and Sir George Sydenham's Caſe cited, Goulſ. 172, 173. S. C. and S. P.

3. But if undertaking to recite it he miſtakes and ſells the ſaid Term, it is a void Sale, unleſs there be general Words, All the Intereſt, *&c.* of the Defendant therein. 4 *Co.* 74. *a.*

4. But a Term cannot be extended, without ſhewing the Certainty thereof, becauſe after the Debt paid the Party is to have his Term again, if any Part thereof remains. 4 *Co.* 74. *a.*

5. If

5. If an Under-ſheriff upon a *Fieri facias* perſuades a (a) Jury to prize the Goods at an under Value, which they do, and he after delivers them to the Plaintiff for the Sum, it is an Oppreſſion, and puniſhable at the Aſſiſes by Indictment. *Paſch.* 15 *Jac. Sayer's* Caſe, *Cro. Jac.* 426.

(a) That the Sheriff upon a Fieri facias may ſell without Inquiry of the Value by Jury. 4 Co. 74. b. Cro. Eliz. 584. Goulſ. 173. — That the Sheriff may ſell at any Rate, where Defendant denies to pay the Money. 1 Vent. 7.

Executions.

How by ſeveral Statutes.

1. (b) By the Statute of *Marlbridge* made 52 *Hen.* 3. *cap.* 23. a *Capias* is given in Account.

(b) Which vide with the Comment thereon. 2 Inſt. 143.

2. (c) By the Statute of *Weſtm.* 2. made the 13 *Edw.* 1. *cap.* 11. a *Capias* lies in Account, and Outlawry thereon.

(c) Which vide with the Comment thereon. 2 Inſt. 378. and my firſt Part 231.

3. (d) By the Statute of *Weſtm.* 2. *cap.* 18. the *Elegit* was given.

(d) Which vide 2 Inſt. 394. and the Comment thereon, and herein after under Title Elegit.

4. By the Statute of 25 *Edw.* 3. *cap.* 17. a *Capias* is given in Debt and Detinue.

5. By the Statute 19 *Hen.* 7. *cap.* 9. like Proceſs is given in Caſe as in Debt and Treſpaſs.

6. By the Statute of 23 *H.* 8. *cap.* 14. like Proceſs is given in a Writ of Annuity and Covenant as in Caſe.

Executions by Statute.

Elegit.

1. By the Statute of *Weſtm.* 2. *cap.* 18. made the 13 *Edw.* 1. when a Debt is recovered or acknowledged in the (e) King's Court, or Damages awarded, it ſhall be in the Election of him that ſues to have a (f) Writ of *Fieri facias*, that the Sheriff levies of the Lands and Goods, or that the (g) Sheriff deliver to him (h) all the Chattels of the Debtor, ſaving his Oxen and Beaſts of the Plough, and one Half of his (i) Lands (k) till the Debt be (l) levied upon a (m) reaſonable Price or Extent.

(e) Vaugh. 102.

(f) Under theſe Words a Levari facias is included. 2 Inſt. 395.

(g) Being a beneficial Law, it extends by Equity to every other immediate Officer to every Court of Record. 2 Inſt. 395. 4 Co. 65. a. Cro. Car. 319. (h) If theſe be ſufficient to pay the Debt, then he ought not to extend the Land. 2 Inſt. 395. Godb. 84. (i) Viz. Such as he had at the Time of the Judgment given or Recognizance acknowledged. 2 Inſt. 395. but to what Time the Execution ſhall relate as to Land, vide under this Title Execution ante . (k) Diverſity as to holding over where edicted for Part of the Time by a Stranger, and where by Defendant himſelf. 2 Saund. 72. (l) Yet if the Party pays or ſatisfies the Debt on Record, he may enter. 2 Inſt 396. — But if a Term be appriſed by a Jury at 100l. and at that Price delivered to the Plaintiff, tho' the Money be after raiſed out of the Profits, yet the Defendant ſhall not have his Term again; but if he had before the Delivery tendered the 100 l. in Pais, or after in Court. Moor 873. pl. 1216. it is ſaid he might have had an Audita Querela. Vide 1 Brownl. 38. 2 Saund. 72. (m) By this is implied, that the Appraiſement and Extent muſt be by Inqueſt, and ſo returned of Record. 2 Inſt. 396. Co. Lit. 289. b. Dal. 28. Goulſ. 172. Godb. 84. — The Sheriff cannot ſell Goods upon an Elegit without taking an Inquiſition. Palmer and Humphry, Cro. Eliz. 584. 4 Co. 74. a. b. Goulſ. 172, 173.

2. If one acknowledges a Recognizance of 100 *l.* to be paid at five ſeveral Days, *viz.* 20 *l.* at each Day preciſely; after the firſt Day an *Elegit* may be ſued for 20 *l.* and a Moiety of the Land delivered, and after the ſecond Day another *Elegit* for 20 *l.* more, and the Moiety of the Remnant delivered, & *ſic de cæteris*, for they be in Effect ſeveral Judgments. 3 *Inſt.* 395.

3. If *A.* and *B.* have each of them a Judgment againſt *C.* and *A.* having the firſt upon *Elegit*, hath a Moiety of the Lands of *C.* delivered to him, and after *B.* upon his Judgment takes out an *Elegit*, he (a) ſhall have but a Moiety of the Moiety remaining delivered to him. *Trin.* 38 *Eliz.* between *Huyt* and *Cogan*, *Cro. Eliz.* 482, 483. *per Curiam*; but they adviſed the Sheriff to return the Special Matter, and (b) 10 *Ed.* 2. Execution is cited, that the intire Moiety ſhould be delivered.

(a) But Quære if it be not otherwiſe where both Judgments are of the ſame Term, being as the ſame Day. Hard. 23, 24, 27.

(b) Which vide Fitz. Execution 137.

(c) Capias ad Satisfaciendum.

1. A *Capias ad Satisfaciendum* did not lie at Common Law where Debt, &c. or Damages recovered, but only where the original Action was *Vi & Armis*, &c. *Co. Lit.* 290.

(c) Againſt whom it lies, vide Rol. Abr. 897, 898. and the Notes there.

2. But ſeveral Statutes have (d) given a *Capias ad Satisfaciendum* where Debt, &c. or Damages are recovered. *Co. Lit.* 290.

(d) They have given a Capias in Proceſs, vide under this Title Executions by ſeveral Statutes ante.

3. It is a Rule, that where a *Capias* lies in the Proceſs, there after Judgment, a *Capias ad Satisfaciendum* lies. 3 *Co.* 12. *a.*

4. If Coſts are adjudged to the Defendant upon a Nonſuit, he may have a *Capias ad Satisfaciendum* againſt the Plaintiff for them. *Mich.* 18 *Jac.* between (e) *Dyer* and others, and *Fincham*, *Cro. Jac.* 595. adjudged, and that it was the uſual Practice, as the Clerks affirmed.

(e) 1 Rol. Rep. 212. S. C. adjudged.

Execution.

Where good, without a Return of the Writ.

1. If a Sheriff by Force of a *Fieri facias* levies the Money, and delivers it to the Party; this is good without any Return of the Writ. *Trin.* 42 *Eliz.* in *Hoe*'s Caſe, 5 *Co.* 90. *a.* reſolved, and the Command of the Writ being *Quod habeas denarios*, &c. (f) if he does not make a Return he may be amerced, and yet the Execution without ſhall ſtand good. 5 *Co.* 90. *b.*

(f) 1 Rol. Rep. 77.

2. So if one be taken on a *Capias ad Satisfaciendum*, the Execution is good, tho' the Writ be not returned. 5 *Co.* 90. *a.* reſolved, tho' if a *Capias ad reſpondendum* be not returned, the (g) Arreſt is tortious, for the End of that Writ is to have the Party appear to anſwer.

(g) And falſe Impriſonment will lie, for which vide 2 Rol. Abr. 563. pl. 8, 9. and the Notes there.

3. Upon all Executions, when the Sheriff alone does it, as upon (h) a *Capias ad Satisfaciendum*, *Habere facias Seiſinam* or *Poſſeſſionem*, *Fieri facias*, *Liberate*, &c. the Execution being duly made, is good, tho' the Writ

(h) Cro. El. 17. Moor 57. pl. 163. Kelw. 3. Dal. 58. Ow. 48. Lane 52. Godb. 82, 83. Lat. 203.

be not returned. 5 *Co.* 90. *a.* for thereby the Plaintiff hath the Effect of his Suit.

(a) In Cases where an Inquest is taken, there ought to be a Return, that the Sufficiency thereof may appear. 4 Co. 57. and for this vide Cro. Eliz. 17. 1 Leon. 280. 2 Leon. 13, 89. Godb. 82, 83. Palm. 289.

4. But upon an *Elegit* where the Extent is made by (a) Inquisition, and not by the Sheriff alone, it ought to be returned, or otherwise it avails nothing. 5 *Co.* 90. *a.*

(b) Re-extent.

(b) For this vide 2 Rol. Abr. 476. and the Notes there.

(c) By several Books, and by the Statute 32 H. 8. herein after mentioned, it appears, that after a full and perfect Execution had by Extent returned, and of Record, there should not, upon any Eviction, have been a Re-extent, tho' after an insufficient Extent there might have been a new one. Co. Lit. 290. yet vide 2 Inst. 679. at the Top; and vide Cro. Jac. 693. in the Case of Clerk and Andrews, a Diversity where a Stranger's Lands were extended, and delivered as the Lands of one of the Defendants, and so meerly void, and where the Defendant was a Disseisor, and the Extent avoided by prior Title. 1 Keb. 697.

1. After an Extent returned by the Sheriff and filed, there (c) can be no Re-extent granted upon a Suggestion, that it is of more than half the Land in Value, and the like. 2 *Inst.* 396.

(d) Lit. Rep. 77.

2. But before the Extent is filed, the Court may examine the Cause, and if there be found to be (d) Fraud, Deceit, or Partiality, they may stay the Filing of that Writ, and grant a new One. 2 *Inst.* 396.

(e) 3 Leon 239. 4 Leon. 10, 11. 1 Brownl. 39.

3. (e) If an Extent be avoided by one made on a more antient Statute or Judgment, after that is satisfied, the Land shall be held under the former without any Re-extent. *Co. Lit.* 289. *b.*

(f) For the more full Exposition of this Statute, vide Co. Lit. 289. 2 Inst. 677, 678, &c.

(g) So that if the Party hath Remedy in præsenti or futuro, for all or Part, the Statute does not extend to it. Co. Lit. 289. b. 4 Co. 66. *a.* b. 2 Inst. 679. Godb. 258. Cro. Jac. 694.

4. (f) By the Statute of 32 *Hen.* 8. *cap.* 5. reciting, that Lands, &c. taken in Execution have been evicted, &c. whereby the Recoverors, &c. have been (g) clearly without Remedy to come by any Part of their Debt, &c. it is provided, that if after such Lands, &c. be had and delivered in Execution, they shall upon a just or lawful Title (wherewithal the said Lands, &c. were liable, tied or bound at such Time as they were delivered or taken in Execution) be recovered, devested, taken or evicted out of or from the Possession of any such Person, &c. before such Time as the said Tenants by Execution, their Executors or Assigns shall have fully levied their Debt and Damages, for which the said Lands, &c. were taken in Execution; then every such Recoveror, Obligee and Recognizee, shall have a *Scire facias* out of the said Court from whence the former Execution was pursued, their Heirs, Executors or Assigns, to have Execution of other Lands, &c. liable to be taken in Execution for the Residue of the Debt or Damages.

Executor.

Fol. 906.

Ordinary.

(A) What Power the Ordinary hath in Adminiſtrations.

1. AT the Common Law the Ordinary (a) could not have an Action to recover any Debt of the Teſtator. 18 H. 6. 23. b. Com. Gresb. and Fox 277. b. Co. 8. Sir John Needham 135. b.

(a) But yet vide F. N. B. 120. D. and 211. Q.

2. At Common Law he might have Treſpaſs for Goods taken out of his (b) Poſſeſſion.

(b) Not if taken before Seiſure, but in ſuch Caſe the Executors or Adminiſtrators may have Treſpaſs. 2 Inſt. 398. F. N. B. 120. D. 3 Mod. 25. 2 Rol. Abr. 399. pl. 1.

3. At Common Law no Action would lie againſt the Ordinary. 18 H. 6. 23. b. Com. Gresb. and Fox 277.

4. (c) Now by the (d) Statute of W. 2. cap. 19. an Action lies againſt the Ordinary. 18 H. 6. 23. Com. Gresbrooke and Fox 277.

(c) He was chargeable by the Common Law, if Goods came to his Hands, and he would not adminiſter and pay Debts, &c. nor grant Adminiſtration, ſo that this Act is but in Affirmance of the Common Law. 2 Inſt. 398. Cart. 132. 3 Mod. 25. Style 305. and vide my 2d Part 313. D. 1. and the Notes there.

(d) Which vide 2 Inſt. 397.

5. But he cannot have an Action by the Statute. 18 H. 6. 23. b. Com. Gresb. and Fox 277. b.

6. (e) The Ordinary cannot releaſe any Debt of the Teſtator before Adminiſtration granted. 18 H. 6. 23. b.

(e) Kelw. 127. a. S. P. debated, Co. Lit. 292. b. S. P. held otherwiſe by ſome.

7. So a fortiori he cannot releaſe after Adminiſtration granted. Contra 18 H. 6. 23. b.

8. But if a Treſpaſs be done to the Goods in the Poſſeſſion of the Ordinary, he may releaſe it; and this Releaſe ſhall be a good Bar againſt the Adminiſtrator made after. 18 H. 6. 23.

9. Rot. Parliamenti 1 H. 5 Numero 13. King H. 4. made divers Executors, who refuſed, becauſe they had not ſufficient for Debts and Legacies, by which diſpoſitio teſtamenti bonorum & catallorum hujuſmodi ad dictum conſanguineum noſtrum (who was the Archbiſhop of Canterbury) tanquam ad Ordinarium de jure pertineret, ac bona & catalla præd. pro ſatisfactione & ſolutione & aliis prædictis implendis Venditioni publicæ exponi deberent, &c. upon which the King took the Goods for the Value to be paid to the Executors according to the Will, &c. and it was ordained in Parliament, that the Executors ſhould not be ſued by the Creditors.

10. (a) Pro-

(a) 5 Co. 16. a. b. S. P. in Audry's Caſe. 9 Co. 37. b. Vaugh. 207. 1 Sid. 46. 371.

10. (a) Probate of Teſtaments (b) *de conſuetudine Angliæ, & non de jure communi*, belong to the Court Chriſtian, 2 *Inſt.* 488. cited from *Linwood*, and ſaid, that theſe Things being temporal, and not meer ſpiritual, belonged not *ab initio* to the Court Chriſtian; but the Eccleſiaſtical Judges derive their Juriſdiction therein by Parliament and the Cuſtom of the Realm, and not from any foreign Power.

(b) But for the Antiquity of the Eccleſiaſtical Juriſdiction therein, vide 2 Rol. Abr. 217. and the Notes there. —— And vide Cart. Rep. 31. 2 Mod. 148. 1 Lev. 158, 186, 187. 1 Sid. 171.

(c) 6 Mod. 145. S. P. per Holt Ch. Juſtice.

11. (c) The Biſhop of *Cork* in *Ireland*, being in *London*, may commit Adminiſtration of Things within his Dioceſe in *Ireland*. *Paſch.* 27 *El.* between *Carter* and *Crofts*. *Godb.* 33. *per Curiam* held clearly, (d) becauſe it is an Authority or Power which follows his Perſon, and where-ever his Perſon is, there is his Authority.

(d) This Power of granting Adminiſtration, making Deans, &c. in his own Dioceſe, follows the Perſon of the Biſhop, tho' his other Juriſdiction is local. Knollis and Robbins, Godb. 342. Palm. 368. and vide 6 Mod. 145.

(e) So the Archbiſhop of Canterbury being at York, may, &c. Lutw. 535. adjudged.

12. So the (e) Biſhop of *London* being at *York* may commit Adminiſtration, but it muſt be of Things within his own Dioceſe. *Paſch.* 27 *El.* between *Carter* and *Crofts*, *Godb.* 33. *per Curiam*.

(B) What Power the Ordinary hath touching Wills, and the Proving thereof, *&c.*

1 H. 5. Rot. Parliamenti, Numero 23. **The Commons prayed, That Executors thereafter ſhould not be compelled to travel to prove Wills, or to bring any Inventory of the Teſtator's Goods to the Ordinary, or their Officials, Commiſſaries, Officers or Miniſters out of the Deanery in which the Goods of the Teſtator are, on Pain to forfeit treble Damages, &c.**

The Anſwer thereto, and to the other Part of the Petition.

Fol. 907.

1. **The King hath charged the Lords Spiritual to ordain due Remedy, and if they did not, the King would have it in Memory, and make it to be amended in Time to come.**

2. When the King is made Executor of any Will, he may appoint certain Perſons to take the Execution of the Will upon them (againſt whom ſuch as have Cauſe of Suit may bring their Actions) and appoint others to take the Account. 4 *Inſt.* 335.

(a) (b) *Administration.*

(C) (c) In what Cases it shall be granted.

1. If all the Executors refuse to administer, Administration shall be granted (d). 21 Edw. 4. 24. (e) 20 H. 6. 1. b. 38 H. 6. 8. for now the Testator is dead Intestate. 19 E. 3. Covenant 24. 50 E. 3. 9. but otherwise it is if (f) one refuses and another proves the Will. Co. 9. Hensloe 37.

(a) Every Executor is an Administrator of the Goods, and the Pleading is Me unques Executor, nor ever administered as Executor, and the Administrator hath the Office of an Executor. 5 Co. 83. a.

(b) To what Time it shall relate, vide 2 Rol. Abr. 399. A. 1, and the Notes there. (c) Wentw. Off. Ex. 59. (d) Br. Executors 117. S. C. (e) Fitz. Executors 15. S. C. (f) And in such Case no Administration can be granted till all dead, or refused. Hard. 111.

2. If an Executor administers before Probate of the Will, and after refuses to prove the Will and administer, when the Ordinary makes Process against him, (g) the Ordinary may grant Administration. 3 H. 7. 14.

(g) But M. the Executor having before administred. 1 Mod. 214. 2 Brownl. 58. and vide post 1 Rol. Abr. 917. B. 1, 2, 3. Went. Off. Ex. 55.

3. If a Man makes an Executor, and it is not known or concealed, the Ordinary may grant Administration, and it shall be good (h) till the other proves the Will. 7 E. 4. 12. b. 13.

(h) But vide Slingsby and Lambert. Cro. Jac. 394. 3 Bulst. 112. 1 Rol. Rep. 276. Godb. 262. and 2 And. 150, 151. 2 Jon. 72. Pl. Com. 277.

4. But if a Man makes an Executor, the Ordinary cannot grant Administration (i) before Refusal of the Executor, 3 H. 4. Administrat. 22 adj.

(i) Not if upon a Citation to prove it he does not appear. 1 Leon. 90.

5. (k) If A. makes a Promise to B. and after B. dies Intestate, and Administration of his Goods is granted to C. who dies after Intestate, and after Administration is granted to D. of the Goods of C. D. cannot have an Action upon this Promise made to B. as Administrator to C. for he is not Administrator to B. in as much as Administration is not granted to him of the Goods of B. unadministred by C. Mich. 15 Car. B. R. between Goslyn and Osborne. per Curiam, adjudged upon a Demurrer. Intratur Trin. 15 Car. Rot. 926.

(k) Goulsb. 182. S. P.

6. If all the Executors before the Ordinary refuse, Administration shall be granted. (l) 21 Edw. 4. 24. (m) 20 H. 6. 1. b. 36 H. 6. 8.

(l) Br. Executors 117. S. C.

(m) Fitz. Executors 15. S. C.

7. (n) If an Executor dies Intestate, Administration ought to be granted of the first Testator, for now he is dead Intestate. (o) 21 Edw. 4. 24. 26 H. 8. 7.

(n) Hard. 473. S. P.

(o) Br. Executors 117. S.C.

8. But if an Executor after Administration dies Intestate, and the Ordinary grants Administration of all the Goods of the Executor, he may administer the Goods of the first Testator. 10 Edw. 4. 1. (p) (Quære of this.)

(p) Where such Administrator could not before the Statute have sued out Execution upon a Judgment obtained by the Executor. Ante 309. pl. 5.

9. If an Administrator makes his Executor, and dies, his Executor shall not have Administration of these Goods, but a new Administration ought to be granted of them. 34 H. 6. 14. D. 32 H. 8. 47. 11 Co. 5. Brud. 9. b. adjudged.

(a) Hayton and Wolfe S.P. adjudged, Cro. Jac. 614. Palm. 153, 154, &c.

10. (a) If an Executor before Probate of the Will of his Testator, makes an Executor and dies, the Executor of the Executor (b) shall not assume upon himself the Execution of the first Will, but Administration of the Goods of the first Testator with the Will annexed shall be granted. D. 22, 23 El. 372. b. said by the Judges of the Prerogative Court to be the Usage and Custom of the said Court Prerogative, and agreeable to the Law, by the Opinion of Dyer, to which the Court gave Credit.

(b) Because he cannot prove the Will of the first Testator, and therefore incapable of recovering his Debts, and consequently of being his Executor. Salk. 308.

11. If the Ordinary knowing nothing of a Will grants Administration, and the Executor after renounces, yet this will not make the Administration before granted good, or the Sale of a Lease before made by such Administrator good; but after such Renunciation, the Administration being repealed, a new one may be granted. *Mich.* 28 *Car.* 2. between (c) *Abram* and *Cunningham*, 2 *Jones* 72. adjudged.

(c) 2 Mod. 146, 147. S. C. adjudged.

1 Vent. 303, 304. S. C. adjudged, 2 Lev. 182. S. C. adjudged, 3 Keb. 725. S. C. and vide 1 Show. 406, 407, &c. a long Argument.

Fol. 908.

Administration upon the Statute of (d) 31 E. 3. cap. 11.

(d) The Inconvenience before this Statute was, that altho' the Ordinary might have seised the Goods of the Intestate, yet neither he nor any under him could sue for his Debts in the King's Courts, so that the Debtors would defraud the Wife and Children, and Creditors lose their Debts. Cart. 132. by Dr. Walker, arguendo, 1 Show. 407.

(D) (e) How it ought to be granted.

1. (f) The Ordinary may grant several Administrations of several Parts of the (g) Goods of the Intestate. 10 E. 4. 1. b. 18 H. 6. 12. b. 38 E. 3. 21.

(e) If it be granted and entered in the Registry, tho' Letters of Administration be not made out, it is sufficient. 1 Show. 408. and vide Dy. 294. pl. 7. (f) Hetl. 135. L. P. (g) But if there be a Bond for 100 l. Administration cannot be granted as to 50 l. Part thereof to one, and as to the other 50 l. to another. 1 Sid. 100. 1 Salk. 36.

2. The Ordinary may grant Administration upon Condition, as where before it was granted to J. S. who is now outlawed and in Prison beyond the Seas; it may be granted to another ita tamen, that if the said J. S. returns into England, he shall administer when he returns. 34 H. 6. 14.

(h) For the Exposition of this Statute vide 9 Co. 39. b. 40.

3. By the Statute (h) of 31 *Edw.* 3. *cap.* 11. Where one (i) dies Intestate, the Ordinary (k) shall depute the (l) next and most lawful Friends of the Intestate to administer, which Deputies shall demand and recover

(i) This extends to a Civil Death, viz. Entry into Religion as a natural Death. 9 Co. 40. a. (k) And if he refuses it is a Contempt to the King and Injury to the Party. 9 Co. 39. b. —— That an Action lies for such Refusal. Cart. 125. (l) The Administration to the Wife deceased, of right ought to be granted to her Husband as her most faithful Friend, within this Statute. Jones and Rowe, 1 Jon. 175. adjudged, Cro. Car. 106. adjudged, but for this vide Moor 871. pl. 1210. Palm. 521. 1 Sid. 409. 1 Mod. 231. 1 Show. 351. 1 Salk. 36. 2 Mod. 20. —— Who shall be said next Friends within the Statute. Vide Raym. 498.

as Executors the Debts due to the Inteſtate to adminiſter and diſpend for his Soul, and ſhall anſwer alſo to whom the Inteſtate was holden or bound, as Executors ſhall anſwer, and they ſhall be (a) (b) accountable (c) to the Ordinary (d) as in Caſe of a Teſtament.

(a) Might be ſued there to account, but not to diſtribute. Noy 24. and vide Noy 28, 78. Cart. 12. —— And vide James and James. 1 Rol. Rep. 123. 2 Bulſt. 315. (b) By the Statute of the 1 Jac. 2. c. 17. No Adminiſtrator ſhall be cited to render an Account of the Perſonal Eſtate of, &c. otherwiſe than by an Inventory, unleſs at the Suit of ſome Perſon in Behalf of a Minor, or having a Demand as Creditor or next of Kin. —— But 1 Salk. 316. it is ſaid the Statute had no Effect, the Law being ſo before that the Ordinary, ex officio, could not cite him. (c) By this it appears, that an Executor was compellable to account before the Ordinary, and ſo was an Adminiſtrator, but then the Ordinary was to take the Account as given in, and could not oblige them to prove the Items of it, nor ſwear the Truth of them. 1 Salk. 315. per Holt Ch. Juſt. and vide Noy 78. (d) So if a Creditor had ſued in the Spiritual Court, for he had a Remedy at Law; but if a Legatee had ſued for an Account, the Defendant muſt have proved his Account, for the Legatee had no Remedy but in the Eccleſiaſtical Court; yet in ſuch Caſe if the Executor would pay him, he could ſue no further. 1 Salk. 31. 6 Car. 2. —— So a Perſon intitled to Diſtribution by the Statute of 22 & 23 Car. 2. being a Statute, Legatee may have the ſame Remedy, and oblige an Adminiſtrator to prove his Account. 1 Salk. 251, 316.

4. (e) If an Executor be beyond the Seas, an Adminiſtration may be granted during his Abſence; for it is as reaſonable in this Caſe as *Durante minoritate* or (f) (g) *pendente lite*, and ſuch Adminiſtrator is accountable to the Executor. *Mich.* 3 *Ann.* between (h) *Slaughter* and *May*, 1 *Salk.* 42. And in an Action brought by ſuch Adminiſtrator, it was intended, that the Abſence was beyond the Seas, but then there ought to have been an Averment, that he was abſent.

(e) Hodge and Clare, 4 Mod. 14, 15. S. P. adjudged, tho' being cited in 6 Mod. 304. it is there denied to be Law, but as cited 1 Lutw. 342. it was ſaid to have been adjudged, that ſuch Adminiſtration was grantable, and a great Convenience thereby; for otherwiſe if the next of Kin was beyond Sea, the Debts of the Inteſtate could not be collected or recovered; and it was alſo held by the Court, that after the Return of the next of Kin, Payment to ſuch Adminiſtrator before Notice is good. (f) That ſuch Adminiſtrator is liable to be ſued, for he is fully an Adminiſtrator for the Time. (g) Where there is a Controverſy in the Spiritual Court concerning the Right of Adminiſtration, an Adminiſtration granted pendente lite is good, otherwiſe where the Controverſy is concerning a Will. Carth. 153. and vide Moor 636. pl. 874. 3 Keb. 54. Fitzg. 202. —— Where Executors made from a Time to come, Adminiſtration granted in the mean Time. Dal. 85. (h) 6 Mod. 304. S. C. adjudged.

(E) Upon the Death of what Perſon Adminiſtration may be granted.

1. IF a Feme Covert dies Inteſtate, Adminiſtration may be granted of her Goods; for peradventure ſhe hath Things in Action, the which are not given to her Husband by the Law. D. 8 El. 251. 90. admitted.

(F) Who ſhall grant it.

Metropolitan.

1. IF he that dies Inteſtate hath Goods in ſeveral Counties, the Metropolitan ſhall grant Adminiſtration. 14 H. 6. 21. 10 H. 7. 18. 35 H. 6. 43.

2. If

2. If he hath bona notabilia to the Value of 100 s. in ſeveral Dioceſes, the Metropolitan ſhall grant Adminiſtration. 10 H. 7. 16. b.

3. If a Man dies beyond the Seas inteſtate, the Archbiſhop ſhall grant Adminiſtration, P. 11 Jac. B. per Coke, to be adjudged in 42 El.

4. The Probate of every Biſhop's Teſtament or granting of Adminiſtration of his Goods, tho' he hath nothing but within his own Juriſdiction, belongs to the Archbiſhop. 4 *Inſt.* 335.

(a) But vide Cro. El. in Byron's Caſe 472, and Noy 54.

5. But where one leaves Goods in one Dioceſe in one Province, and Goods in another Dioceſe in another Province, (a) each Biſhop muſt grant an Adminiſtration. *Salk.* 39.

6. But if a Man leaves *Bona notabilia* in ſeveral Dioceſes of the ſame Province, there muſt be a Prerogative Adminiſtration. *Salk.* 39.

7. And if one leaves *Bona notabilia* in two Dioceſes in the Province of *Canterbury*, and Two in the Province of *York*, there muſt be two Prerogative Adminiſtrations. *Salk.* 39.

Adminiſtration.

(G) (b) By whom it ſhall be granted.

(b) Whether by Commiſſioners delegate in any, and what Caſe. Latch 85, 86.

1. IF a Man hath Bona notabilia (c) in Ireland and England, and dies Inteſtate, there ſhall be ſeveral Adminiſtrations granted, viz. by the Archbiſhop of Dublin for all within his Province, and by the Archbiſhop of Canterbury for all within his Province, (but it ſeems to be intended that he had Bona notabilia in divers Dioceſes within each Province, or Goods in his Dioceſe, for otherwiſe it ſeems it ought to be granted by the Ordinary where the Goods are, and not by the Metropolitan). (d) Dy. 14 El. 305.

(c) 2 Lev. 86. S. P. per Hale. — So if in the Provinces of Canterbury and York. 2 Lev. 86.

—— And Adminiſtration granted in one Province is void as to the other, becauſe they are diſtinct ſupream Juriſdictions. Hard. 216. Salk. 39. (d) Dal. 76, 77. S. C. 3 Keb. 163.

2. In the Time of the Vacation of the Archbiſhop or of a Biſhop, the Dean and Chapter ſhall grant Adminiſtration. 36 H. 8. Brook Adminiſtr. 276. per omnes legis peritos, and by thoſe of the Arches.

3. It is ordained by a Canon 1 Jac. cap. 92. That if any Man dies in Itinere, the Goods which he hath about him at the Time ſhall not Cauſe his Teſtament or Adminiſtration to be liable to the Prerogative Court.

(e) Byron and Byron, L. P. Cro. Eliz. 472. adjudged, Noy 15. adjudged. — That an Adminiſtrator made by a Biſhop of Ireland, cannot bring an Action here as Adminiſtrator. Carter and Crofts. Godb. 33.

4. (e) If a Man becomes bound in an Obligation in London, and dies Inteſtate in Devon, and there had the Obligation at the Time of his Death, Adminiſtration ought to be granted by the Biſhop of Exon, where the Obligation was at his Death, and not by the Biſhop of London, where the Obligation was made, for the Debt ſhall be accounted Goods as to the Grant of the Adminiſtration where the Deed was at his Death, and not where it was made. Trin. 14 Car. B. R. between Lunn and * Dodſon, per Curiam, adjudged in an Action brought by the Adminiſtrator in London, ſuppoſing the Obligation to be there made, and ſhews the Adminiſtration to be granted by the Biſhop of Exon, and Judgment that it lies upon Demurrer to the Declaration; and Mich. 15 Car. it was affirmed upon a Writ of Error.

* Fol. 909.

(H) (a) What ſhall be ſaid *Bona notabilia.*

(a) Wentw. Office of Executors 64.

1. IF a Man hath Goods of the Value of 5 l. in one Dioceſe, and a Leaſe for Years of the ſame Value in another Dioceſe, theſe are Bona notabilia by which the Archbiſhop ſhall grant Adminiſtration, tho' the Leaſe for Years is not a Thing moveable, nor properly bonum, but it is a Chattel, as the Pleading is.

2. But ſee the old Book of Entries 324, where it is (b) pleaded, that the Archbiſhop ſhall grant Adminiſtration, becauſe he had Bona notabilia in divers Dioceſes.

(b) As to the Pleading thereof, vide 2 Leon. 155. 1 Lutw. 30. 2 Lutw. 994.

3. If a Man hath Goods of the Value of 5 l. in one Dioceſe, and an Obligation of greater Value in another Dioceſe, the Obligation being made there alſo; theſe are Bona notabilia for which the Archbiſhop ſhall grant Adminiſtration. D. 14 El. 305, 58. it ſeems it is ſo to be intended.

4. (c) To make Bona notabilia a Debt (d) without Specialty, ſhall be accounted to be Bona where the Debtor lives. Hill. 37 El. B. and not where the Teſtator lived, (it ſeems not to be Law.)

(c) Wentw. Off. of Exec. 67. S. P. N. Dyer 305. a. Margine, 3 Keb. 163.

(d) As where due on a Bill of Exchange, or Award in Writing; for tho' in Writing, it is only due by ſimple Contract: Yeomans and Bradſhaw, Comb. 392. adjudged, Carth. 374. adjudged.

5. But a Debt upon Specialty ſhall be accounted bona where it was made, (it ſeems not to be Law.)

6. (d) If a Man dies Inteſtate having ſeveral Debts upon Obligation in ſeveral Dioceſes, the Debts ſhall be ſaid Bona notabilia where the Obligations are, and not where the Debtor or Debtee are. Trin. 17 Jac. Trin. 17 Jac. B. between (e) Trowbridge and Taylor. per Curiam.

(d) 3 Keb. 438.

(e) N. Dyer 305. a. Margine.

7. If a Man dies in a Dioceſe not having any Goods there, but hath Bona notabilia in another Dioceſe, it will be ſufficient Bona notabilia for the Archbiſhop to grant Adminiſtration, &c. becauſe the Ordinary where he dies is to take as great Care of the Teſtator and his Goods, as the other Ordinary where his Goods are: Maſter Selden told me, that he had been informed by thoſe of the Court Chriſtian, that it is the uſual Courſe at this Day.

8. If one hath a Judgment in any the Courts at *Weſtminſter*, this makes *Bona notabilia*, tho' the Action upon which obtained was laid in another County. *Trin.* 2 *Will. & Mar.* between (g) *Gold* and *Strode*, *Carth.* 148. agreed *per Curiam.*

(g) 3 Mod. 324. S. C. and S. P. 2 Show. 437.

and vide Far. 15. Salk. 40. 1 Lutw. 401. 6 Mod. 136. Mod. Caſ. 244.

(I) Of what Value they ought to be.

1. ANciently if a Man died Inteſtate having Goods to the Value of 40 s. in two Dioceſes, this would make the Goods to be Bona notabilia, for which the Adminiſtration ſhould be granted by the Archbiſhop. Perkins, Sect. 489.

2. But in the 37 H. 6. 28. it is held per Curiam, That if a Man hath Goods in several Dioceses, tho' the Goods which he hath in one County are but of the Value of one Penny; yet these are Bona notabilia, for which the Archbishop shall grant Administration.

3. And in the 10 H. 7. 16. b. it is pleaded, that he had Bona notabilia, viz. Goods to the Value of 5 l. in several Dioceses.

4. If there are Goods of the Value of 8 l. in each Diocese, this shall make Bona notabilia. Hill. 7 Jac. B. Needham's Case, per Foster cited to be adjudged.

(a) Wentw. Off. of Executors 64.

5. (a) It is ordained by a Canon in 1 Jac. cap. 93. that Bona notabilia shall be accounted to be 5 l. at least, and that none shall be said to have Bona notabilia unless he hath Goods in several Dioceses to the Value of 5 l. and it seems this Canon hath changed the Law, if it was otherwise before, in as much * as the granting Administration belongs to the Ecclesiastical Law, and our Law but takes Notice of their Law in this, and therefore they may alter it at their Pleasure. Hill. 7 Jac. B. Needham's Case, by the Doctors and the Court, that 5 l. in each Diocese shall be Bona notabilia.

* Fol. 910.

6. Also in the said Canon there is an Exception of such Diocese, where by Custom or (b) Composition Bona notabilia are rated to a greater Sum.

(b) Regularly Goods of the Value of 5 l. make Bona notabilia, but in the Diocese of London it is 10 l. by Composition. 4 Inst. 335.

(K) (c) To (d) (e) whom it (f) ought to be granted.

(c) Where not to one under Age. Salk. 39. 2 Jon. 48. Skin. 156.

1. If a Feme Covert dies Intestate, Administration of her Goods (g) of Right belongs to her Husband. Co. 4. Ognel 51.

(d) Where it may be to an Alien amy. My first Part 322. pl. 9.

(e) Where one in Execution had a Right to administer to the Plaintiff, and doing so could not be discharg'd, but ought to renounce, and another take the Administration, who might discharge him. 2 Mod. 315.

(f) The Bishop may grant Administration to whom he pleases, if he will forfeit the Penalty limited by the Act. 1 Leon. 240. said by Periam Justice, and Manwood Ch. Baron.

(g) But for this vide ante 350. my Notes upon the Statute 31 Ed. 3.

2. If a Feme Covert dies Intestate, Administration may be granted to a Stranger, tho' her Husband be living. D. 8 El. 251. 90. admitted.

(g) For this vide 3 Mod. 23, 24. Fitzg. 163, 164.

3. Administration *durante minore ætate* of an Executor is not (g) within the Statute of 21 *H.* 8. to be granted of Necessity to the Widow or next of Kin, because there is an Executor all the While. *Hill.* 16 *Jac.* between (h) *Briers* and *Goddard*, *Hob.* 250. *per Curiam.*

(h) 1 Brownl. 31. S. C. and said, that therefore it might be revoked, and granted to another.

4. But perhaps it would be otherwise if an Executor was to be made from a Day to come. *Hob.* 250. *per Cur.*

(i) Style 74, 75. S. C. adjudged.

5. If the Wife as next of Kin hath a Right to administer, the Administration ought not to be granted to the Husband and Wife, for then if she should die before him, he would continue Administrator against the Meaning of the Act. *Hill.* 23 *Car.* between (i) *Brown* and *Wood*, *All.* 36. adjudged.

6. But it was said, that if it had been granted to them only during the Coverture, perhaps it might be good, because if granted to the Wife only, the Husband might during the Coverture have administred. *All.* 36. *per Curiam.*

7. If the Wife as reſiduary Legatee hath a Right to take Adminiſtration, but refuſes and prays it may be granted to another, and not to her Husband, yet it may be granted to her Husband. 11 *Jan.* 1730. *Vanthienem's* Caſe, *Fitzg.* 203. ſo decreed by Delegates.

(L) (a) (b) Adminiſtration (c) (d) *durante minore ætate.*

(a) Where ſaid to be but as a Servant or Bailiff to the Infant. Dal. 85. 3 Leon. 278. Godb. 104. Ow. 35.

(b) How an Action ſhall be brought by an Adminiſtrator durante minoritate of A. Executor of B. Cro. El. 211, 212. Hob. 246.

1. IN an Action of Debt againſt an Adminiſtrator, if the Defendant pleads in Bar a Judgment againſt him by a Stranger upon an Obligation, and in the Record he is named Adminiſtrator durante minore ætate, J. S. who was then within the Age of Twenty-one, viz. of the Age of Eighteen and more; this is a good Bar of the Action; for tho' the full Age of ſuch Infant Executor is Sixteen, yet if an Action be brought againſt the Adminiſtrator after, and this Age of the Infant appears to be paſt, yet if Judgment be given againſt the Adminiſtrator, it is not void. Trin. 14 Car. B. R. between Good and Pinſent, adjudged upon a Demurrer, per Curiam. Intratur Mich. 13 Car. Rot. 449.

(c) Where upon plene adminiſtravit he may ſhew the Delivery of the Effects to the Infant when he came of Age. 1 Mod. 174. Hob. 265. (d) Where if he continues the Poſſeſſion he may be charged after the Infant comes of Age. 1 Sid. 57. Hob. 266.

2. If Adminiſtration be granted to A. durante minore ætate of B. if it appears to the Court in Pleading, that B. is of the Age of (e) Sixteen, the Court ex Officio ought to take Notice of the Eccleſiaſtical Law, that the Adminiſtration is determined and void. Mich. 14 Car. B. R. between (f) Damport and Pinſent, per Jones, Crooke and Barkely, but Brampſton econtra. Intratur Trin. 14 Car. Rot. 698. where the Plaintiff declared in an Action upon the Caſe, that the Defendant was Adminiſtrator durante minore ætate of B. and in Conſideration that the Plaintiff would forbear, &c. promiſed to pay the Debt due by the Teſtator to the Plaintiff, and the Defendant pleads, that at the Time of the Promiſe made, B. was of the Age of Sixteen; and the three Juſtices thought this was a good Plea.

(e) This is printed as in the Original, but I ſuppoſe ſhould be 17, as in the Report of the S. C. in Cro. Car.

(f) Cro. Car. 516. S. C. adjudged.

3. If an Action be brought (g) againſt an Adminiſtrator *durante minoritate* of *B.* and pending the Action *B.* comes of Age, the Defendant may plead this. Between (h) *Ford* and *Glanvile*, *Goulſ.* 136. adjudged a good Plea.

(g) Yet Lutw. 342. it is ſaid to have been held, that altho' an Action durante abſentia abates by the Return of, &c. yet it is otherwiſe where an Action is brought againſt ſuch Adminiſtrator.

(h) Moor 462. pl. 648. S. C. the Judges much doubting whether the Action was abated.

4. If one brings an Action as Adminiſtrator *durante minoritate* of *A.* and avers, that *A.* is within the Age of Twenty-one, and the Defendant pleads an inſufficient Bar, to which the Plaintiff demurs, he ſhall not have Judgment, for the Adminiſtration ceaſes at Seventeen; and tho' he be under Twenty-one, yet he may be Seventeen, or above. *Hill.* 40 *Eliz.* between (i) *Piggot* and *Gaſcoign*, 5 *Co.* 29. adjudged upon a Conference had with the Doctors of the Civil Law.

(i) Cro. Eliz. 602. S. C. adjudged.

5 Mod. 395. S. C. cited, and vide 2 Vent. 378. 1 Brownl. 46. S. C. cited.

5. If

5. If one brings an Action as Adminiſtrator *durante minoritate* of *A.* and the Defendant plead to iſſue, and it is found againſt him; he ſhall not after Arreſt the Judgment, becauſe the Plaintiff had not ſhewed that *A.* was under Seventeen, for (a) when the Defendant hath admitted him to bring the Action and pleaded to iſſue, it cannot be intended that *A.* was above Seventeen. *Mich.* 7 *Car.* between *Wells* and *Somes*, *Cro. Car.* 240. adjudged.

(a) Yelv. 128. like Point adjudged, Lutw. 632. S. P. adjudged, 2 Rol. Rep. 466. 2 Sid. 40, 60.

6. (b) If an Action be brought againſt an Adminiſtrator *durante minoritate* of an Executor, the Plaintiff need not aver the Executor to be within the Age of Seventeen. *Hill.* 13 *Jac.* between (c) *Carver* and *Haſelrig*, *Hob.* 251. adjudged.

(b) Croft and Walbank, Yelv. 128. S. P. adjudged, becauſe the Plaintiff is a Stranger to the Defendant's Power, and cannot know the Infant's Age. Haul and Salvin, 1 Rol. Rep. 400. S. P. vide Vaugh. 93. (c) 2 Sid. 60. S. C. cited.

7. (d) Otherwiſe in an Action brought by ſuch Adminiſtrator. *Hill.* 13 *Jac.* in the Caſe of *Carver* and *Haſelrig* adjudged, *Hob.* 251. *per Curiam.*

(d) For this Diverſity, vide Walthal and Aldridge, Cro. Jac. 590. 2 Rol. Rep. 186, 204, 209, 466. 2 Sid. 60. Yelv. 128.

8. If Adminiſtration (e) be granted during the Minority of Three, and one dies or comes of Age, whether the Adminiſtration was determined, was made a Queſtion. *Trin.* 34 *Eliz.* in *Brudenel's* Caſe 5 *Co.* 9. but not determined.

(e) 1 Leon. 74. 1 Brownl. 46, 47.

9. An Adminiſtration *durante minoritate* of an Executor ceaſes at his (f) Age of Seventeen. *Paſch.* 10 *Will.* between (g) *Atkinſon* and *Corniſh*, 5 *Mod.* 395. *per Curiam.*

(f) For by the Spiritual Law he may be an Executor at Seventeen. 2 Jon. 48. Salk. 39. (g) Comb. 475. S. C. and S. P. per Holt Ch. Juſt.

10. (h) But Adminiſtration granted during the Minority of one not made Executor, does not ceaſe till the Party is of full Age. *Paſch.* 10 *Will.* 5 *Mod.* 395. *per Curiam.*

(h) That ſuch Adminiſtration does not determine till the Party in whoſe Right he acts attains the Age of Twenty-one, for Adminiſtrations are by the Statute, and not grantable to any under Twenty-one, who muſt give Bond, &c. Salk. 39. but vide 2 Jon. 48.

11. If there be two Executors, and one is under the Age of Seventeen, Adminiſtration during his Minority may be granted to the other, ſo that he may bring an Action alone. *Hill.* 30 *Car.* 2. between (i) *Colborne* and *Wright*, 2 *Lev.* 239. adjudged, tho' objected that (k) where there was an Executor, the Ordinary had no Power to grant Adminiſtration.

(i) 2 Jon. 119, 120. S. C. and ſaid there was no Judgment given, but that the Cauſe was agreed. 1 Lev. 181. S. C. argued, and vide Smith and Smith, 1 Brownl. 101. Yelv. 130. (k) For this vide 1 Vent. 104. 1 Mod. 47.

12. If Adminiſtration is granted during the Minority of a Woman, and ſhe takes an Husband of Age, the Adminiſtration ceaſes, for that ſhe hath an Husband who may (l) adminiſter as Executor. *Mich.* 41 *El.* 5 *Co.* 29. *b.* ſo held in *Prince's* Caſe.

(l) That Adminiſtration may be granted to him, vide 1 Vern. 25.

Administrator durante minore ætate.

(M) The Power of such Administrator.

1. AN Administrator durante minore ætate **may sell the Goods of the Testator, and pay the Debts, and do all Things that an Executor may.** (a) Pasch. 42 El. B. R. per Curiam.

(a) Prince and Simpson seems to be S. C. 5 Co. 29. b. 2 And. 132.

2. **An Administrator** durante minore ætate **may have an Action of Trover and Conversion of the Goods of the Testator, for he hath more than the Custody of them, for he hath the Property it self.** Pasch. 42 El. B. R. **between** Sethe **and** Sethe per Curiam **adjudged.**

3. **If an Administration** durante minore ætate **be repealed, and another made Administrator** durante minore ætate, **and the second Administrator brings the first Administrator to account, and after releases him, yet the Infant at full Age may compel the first Administrator to account to him * again, and the first Account to the second Administrator and his Release shall not be any Bar thereof, for the Release of such Administrator is not good, unless it be for such Cause, that he ought to make it.** Mich. 10 Jac. B. per Curiam.

* Fol. 911.

4. An Administrator *durante minoritate* of an Executor cannot sell any of the Goods of the Deceased, if not necessary for Payment of the Debts, or *Bona peritura*; for he hath his Office for the Benefit of the Infant, and not for his Prejudice. *Mich.* 41 *Eliz.* between (b) *Prince* and *Simpson*, 5 *Co.* 29. b. resolved *per Curiam*, and said he (c) could not assent to a Legacy unless there be Assets to pay Debts, *&c.* and generally could do nothing to the Prejudice of the Infant.

(b) 2 And. 132. S. C. and S. P. agreed by the Justices, Cro. Eliz. 718, 719. S. C. 6 Co. 67. S. C. cited, and said that in this Case the Administration was granted specially ad commodum & utilitatem of the Infant, & non aliter.

(c) March 138.

5. But if Administration is granted generally *ratione minoris ætatis*, without any Restraint or Limitation, such Administrator may sue or be sued, for during the Time the Testator is dead *quasi* Intestate. *Mich.* 4 *Jac.* 1. in Sir *Moyl Finch*'s Case, 6 *Co.* 76. b.

6. And (d) such Administrator may make Leases, *&c.* tho' not necessary. *Mich.* 4 *Jac.* 1. in the Case of Sir *Moyl Finch*, 6 *Co.* 67. b. resolved.

(d) That there is such Diversity where Administration during Minority is granted with special Words of Restraint or Limitation, and where granted generally. Vide Wentw. Off. of Execut. 308.

Paraphernalia.

Quod vide Scip. Gent. de donatione 13. 196. *according.*

1. (e) **IT seems that the true Name of this is** Paraphernalia or bona Parapherna, **for by the Civil Law** Bona parapherna sunt quæ mulier ultra dotem adfert, **taken from the Greek Word,** Et de his bonis maritus Administrationem habet ita ut sine speciali uxoris mandato & agere & convenire possit. Minsing **upon the Institutes** 97.

(e) 1 Jon. 353. vide.

2. The petit Customs of Normandy, Ch. de donaire de fems bona paraphernalia ought to be intended of Moveables serving for the Use of the Woman, as serving her Bed Robes, Linen, and other of like Nature, of which the Judge shall make an honest Distribution to the Widow (a) in Being, with regard to the Quality of her and her Husband, called nevertheless l'heritier & creanciers, provided the said Goods do not exceed the Moiety of the (b) Third of the Moveables, yet nevertheless where the Moveables are so small she shall have her Bed, her Robe and her Coffer, (it seems this is agreeable in the Whole with Paraphernalia in our Law). 395

(a) In the Original it is in Essence.

(b) In the Original it is du tiers de Meubles.

3. There is Mention thereof made in our Law where it is named Bona paraphonalia. 12 H. 7. 23. (c) 18 E. 4. 11. b.

(c) Br. Testament 13. S.C.

4. The Apparel of a Woman is called Bona paraphonalia. 18 E. 4. 11. b. per Vavisor.

5. The Wife after the Death of her Husband shall have her (d) necessary Apparel for her Body, and not the Executors of her Husband. 37 H. 6. 28.

(d) Where if she takes more, she shall be taken to be an Executrix de son tort. 1 Rol. 918.

6. So the Wife shall have convenient Apparel for her Body, and not the Executor of the Husband. (e) 33 H. 6. 31. b. Brook Executor 19.

(e) Br. Administrator 6. S. C. Fitz. Executor 24. S. C.

7. But after the Death of the Husband the Wife shall not have excessive Apparel, but the Executors shall have them. (f) 33 H. 6. 31. b. Brook Executors 19.

(f) Br. Administrator 6. S. C. Fitz. Executor 24. S. C.

8. If the Husband delivers to the Wife a Piece of Cloth to make a Garment, and dies, altho' it was not made into a Garment in the Life of the Husband, yet the Wife shall have it and not the Executor of the Husband, in as much as it was delivered to her for this Intent; but against the Debtee of the Husband the Wife shall have no more Apparel than is convenient. Mich. 40, 41 El. B. R. between Harwell and Harwell.

9. A Chain of Diamonds and Pearl worth 370l. being usually wore by a Woman who was the Daughter of an Earl of Ireland and a Baron of England, and the Wife of a Knight and Serjeant at Law of the King, shall be Bona paraphernalia, so that the Husband cannot devise them from the Wife, but the Devise shall be void. Trin. 8 Car. B. R. between (g) the Lord Hastings and Dowglas per Curiam. Upon a Special Verdict, the Defendant having married the Wife of Sir John Davis, who used the Chain in the Life of Sir John. Hill. 9 Car. B.R. it was argued per Curiam, and Richardson and Crook seemed the Wife should not have them, tho' no Debts, because of the Devise, viz. that she should not have them against the Will of her Husband, because they were not necessary for her, tho' convenient. But Jones and Barkely econtra, because convenient for her to wear; but Jones seemed she should not have them as paraphernalia, but by the Law of Reason and Convenience. But all the Court agreed she should have her necessary Apparel as paraphernalia, * and the Husband could not devise them from her, because necessary that she should not go naked, but to be kept from Shame and Cold.

(g) Cro. Car. 343, &c. S. C. with the Arguments of Richardson and Crook, but no Judgment. 1 Jon. 332. and the Court divided, but Crook after said, he should have agreed with Jones and Barkley, if the Husband had not devised them.

* Fol. 912.

10. Four Gold Chains, twenty-eight Dozen of Gold Buttons, and an Agate, were allowed to be Paraphernalia of a Viſcounteſs. *Mich.* 27 & 28 *Eliz.* (a) The Viſcounteſs of *Bindon*'s Caſe, *Moor* 213. *pl.* 354. adjudged.

(a) 2 Leon. 166. S. C. adjudged, and ſaid by Manwood Ch. Baron, that Jewels of the Value of 500 Marks, was a good Allowance for ſuch Matters.

(N) (b) What Perſons may make Executors.

(b) What Perſons may make a Will. My ſecond Part 312.

1. ROT. Pat. 12 E. 1. m. 22. Conceſſio Epiſcopo Bangor quod licet Epiſcopi Wallenſes ex antiqua conſuetudine teſtamentum aliquod condere non poſſint temporibus retroactis, idem tamen Epiſcopus nunc poſſit, &c. Rot. Pat. 18 E. 1. n. 6. Licentia Abbati Sancti Edmundi quod condere poſſit teſtamentum & Executores qui plenam habeant adminiſtrationem de bonis ſuis.

2. **The Queen, the Wife of the King, may make Executors.** 24 E. 1. Rot. Clauſarum m. 11. **Executors were made and admitted, good.**

3. **A Feme Covert Executrix may make an Executor of the Goods which ſhe hath as Executrix.** Mich. 8 Jac. B. Grant's Caſe, per Curiam, **without the Aſſent of the Husband.**

4. **A Feme Covert may make an Executor of Things in Action due to her.** Mich. 8 Jac. B. Grant's Caſe, per Curiam.

5. (c) **A Feme Covert cannot make an Executor without the Aſſent of her Husband, for the Adminiſtration of her Goods of Right belongs to her Husband.** Co. 4. (d) Ognel 51. b. per Curiam.

(c) Jones and Rowe S. P. 1 Jones 175. cited, and ſaid, per Curiam, Cro. Car. 106. per Crook.

(d) Wentw. Off. of Exec. 286, 287. S. C. that it muſt be intended of Things in Action, to which the Husband by taking Adminiſtration to her might intitle himſelf; but yet being an Executrix, ſhe might, without Conſent of her Husband, make an Executor for the Performance of her Teſtator's Will, and vide the Caſe of Finch and Bodyll, 2 And. 91, 92. Moor 339. pl. 459. and vide my ſecond Part 512. pl. 9.

6. The Biſhops, Lords and Commons aſſented in full Parliament, that the King, his Heirs and Succeſſors might lawfully make their Teſtaments, and that Execution ſhould be done of the ſame, whereof ſome Doubt was before made. 4 *Inſt.* 335. and cited *Rot. Par.* 16 *Rich.* 2. *Nu.* 10. not in Print.

7. A Feme Covert cannot make a Will of her Husband's Goods; but if by his (e) Conſent or Agreement ſhe diſpoſeth of any Thing of his, the Property paſſes from him to her Legatee, and is the Gift of the Husband; and if Goods are given into the Hands of another in Truſt for the Wife, ſtill her Will thereof is but a Declaration of the Truſt, and not a Will properly ſo called or to be proved as ſuch. *Paſch.* 28 *Car.* 2. 1 *Mod.* 211.

(e) Vide my ſecond Part 44. pl. 11. and the Notes there. 512. pl. 8. and the Notes there.

2 Roll. Abr. 247. pl. 8. —— And what will be ſufficient Evidence of ſuch Conſent or Diſſent, vide 2 Mod. 172, 173.

8. But of Things in Action and Things that a Feme Covert hath as Executrix, ſhe may make a Will by Conſent of her Husband, and ſuch Will being properly a Will, ought to be proved in the Spiritual Court. *Paſch.* 28 *Car.* 2. 1 *Mod.* 211.

(O) (a) What

(O) (a) What Perſon for a collateral Reſpect may make an Executor.

(a) That an alien Friend may be Executor or Adminiſtrator, vide Cro. Car. 8, 9. My firſt Part 332. pl. 9. Wentw. Off. of Exec. 22.

1. A Man attainted of Felony cannot make Executors, ſo no Adminiſtration ſhall be granted of ſuch a Man. D. 14 El. 309. 76.

2. If an Exigent for Felony be awarded againſt a Man, tho' by this he loſes all his Goods, yet he may make Executors to reverſe it. Co. 5. (b) Marſh's Caſe 111. (for there he is not attainted.)

(b) Cro. Eliz. 225, 273.

S. C. adjudged, Ow. 147. S. C. 1 Leon. 325. S. C. Ante Title Error 17. pl. 34. S. C. which vide with the Notes there. Wentw. Off. of Exec. 23.

3. So Adminiſtration ſhall be granted of ſuch a Man. Co. 5. 111.

4. A Man outlawed in a Perſonal Action may make Executors, for he may have Debts upon Contract (c) not forfeited to the King. Mich. 43, 44 El. B. R.

(c) 2 Rol. Abr. 806. pl. 6.

Wentw. Off. of Exec. 23.

5. So Adminiſtration may be granted of ſuch a Man for the Cauſe aforeſaid. Mich. 43, 44 El. B. R. between (d) Shawe and Cutteres, per Curiam.

(d) Cro. El. 850, 851.

S C. adjudged,

That in an Action brought by ſuch Adminiſtrator, it is no Plea to ſay, his Inteſtate was outlawed, and vide Woolley and Bradwell, Cro. El. 575. 1 Brownl. 55. Hut. 53, 54. 1 Rol. Abr. 914. T. 1. poſt, and the Notes there.

(P) (e) What Actions an Executor may have for an Act in the Life of the Teſtator.

(e) Wentw. Off. of Exec. 93, &c.

1. An Executor may have a Raviſhment of Ward for a Raviſhment in the Life of the Teſtator. (f) 7 H. 4. 2. b.

(f) Br. Executors 122.

S. C. and ſaid this ſeemed to be by the Equity of the Statute De bonis aſportat' in vita teſtatoris. Poph. 191. S. C. cited.

2. If A. be taken upon a Proceſs in an Action of Debt at the Suit of B. and is in Cuſtody of the Gaoler for Want of Bail, and eſcapes, and after B. dies; in this Caſe the Executor may have an Action upon the Caſe upon this Eſcape; for tho' this Action is to have but Damages for the Eſcape, and tho' he was impriſoned but upon mean Proceſs, yet in as much as it was for a Debt, it ſhall be of the ſame Nature, and therefore within the Equity of the Statute of 4 Edw. 3. dubitatur. Mich. 9 Car. B. R. between Startin Plaintiff, and Farmer and Lowton, Bailiffs of Bridgnorth, Defendants. Intratur Trin. 9 Rot. 1390.

Fol. 913.

between (g) Lemaſen and Dixon dubitatur.

(g) Poph. 189, 190. S. C. but no Judgment, tho' it was agreed by all, that if the Action had been for an Eſcape after Judgment it would have lay. Maſon and Dixon S. C. 1 Jon. 173. Lat. 167. Noy 87. The Court divided, and no Judgment, Cro. Car. 297. S. C. cited, Comb. 322. S. C. cited, and vide Style 2. 232. 1 Vent. 30, 31. 6 Mod. 126. 1 Salk. 12.

3. (a) If upon a Fieri facias the Sheriff levies the Debt, and does not return his Writ, nor pay the Money to the Party, and after the Party at whose Suit the Execution was awarded dies, the Executor may have an Action upon the Case upon this Matter. B. R. between (b) Spurstow and Prince. This moved in Arrest of Judgment after a Verdict for the Plaintiff, and thereupon the Plaintiff prayed Judgment against himself (because he would commence a new Action) for his Expedition; for it was objected, that as to the not returning the Writ, it was a personal Wrong.

(a) Williams and Cary L.P. Salk. 12. adjudged an Action lay. Comb. 322. adjudged, 4 Mod. 403, 404 adjudged.

(b) Cro. Car. 297. S. C. and the Court divided.

4. Executors may have a *Quare impedit* upon a Disturbance in the Life of the Testator. *Trin.* 31 *Eliz.* between (c) *Smalwood* and the Bishop of *Litchfield*, *Leon.* 205. agreed *per Curiam*.

(c) 1 And. 241. S. C. Cro. El. 207. &c. and vide

S. C. Ow. 99. S. C. Sav. 95, 118, 119. S. C. adjudged, Noy 87. S. C. cited, 1 Lutw. 1, 2, 6 Mod. 126.

5. An Executor upon the Statute of 2 *Edw.* 6. may have Debt for not setting out Tithes to the Testator due, and this within the Equity of the Statute 4 *Ed.* 3. *c.* 7. *Pasch.* 22 *Car.* 2. (d) Mr. Justice *Moreton*'s Case, 1 *Vent.* 30. adjudged, tho' objected this was a Forfeiture by the Statute given for the Wrong.

(d) 1 Sid. 407. adjudged, that Debt lies by, but said it was not against Executors. 2 Keb. 502. S. C. adjudged, and the Diversity taken, and Kelynge a Duty trebled by the Statute, and not a bare Penalty. 1 Sid. 88. this Diversity made by Twisden, but vide 1 Lev. 39. 6 Mod. 126. 1 Sid. 34, 35. b.

6. An Executor may bring Trespass, and declare that the Defendant *blada crescentia* upon the Freehold of the Testator *messuit*, *defalcavit*, *cepit & asportavit*. *Hill.* 23 & 24 *Car.* 2. between (e) *Emerson* and *Emerson*, 1 *Vent.* 187. adjudged *per totam Curiam*, tho' objected that this Trespass was done to the Freehold of the Testator, for which the Statute gives the Executor no Action, and said *per Curiam*, this was but one Trespass, and the Declaration only described the Manner of taking it away, tho' said, if it had been *Quare clausum fregit & blada asportavit*, it had been naught; (f) so if he had cut the Corn and let it lie, no Action would lie; or if he had cut the Grass and carried it away at the same Time, because the Grass was Part of the Freehold, but Corn growing a Chattel.

(e) 2 Keb. 874, 875. S.C. adjudged.

(f) Wentw. 96, 97, 98. several nice Distinctions, which vide.

7. By the Statute of 4 *Edw.* 3. *cap.* 7. reciting, that in Times past Executors had not Actions for a Trespass done to their Testators, (g) as of the Goods and Chattels of their Testators carried away in their Life, and so such Trespasses had thitherto remained unpunished; it is enacted, that (h) Executors in such Cases should have (i) an (k) (l) Action against the Trespassers, and recover their Damages in like Manner as they whose Executors they be should have had if they were in Life.

(g) Yet where the Goods remained in the Hands of the Trespasser, or undisposed of, Replevin or Detinue would have lay. Wentw. 94. Lat. 167. 1 Jon. 173. 4 Mod. 404.

(h) So an Administrator may have an Action within the Equity of this Act. Cro. El. 384. Moor 400. pl. 526.

(i) That they may have Trover upon a Conversion in the Life of their Testator. Countess of Rutland's Case. Cro. El. 277. Moor 267. pl. 416. Ow. 156. adjudged, and vide 1 Leon. 194. Goulsh. 90. 1 And. 243. 1 Vent. 30, 31. Wentw. 98.

(k) For what Actions will lie by this Statute, vide Wentw. Off. of Exec. 95, &c. 1 And. 242. Noy 87. Poph. 189, 190. 1 Jon. 173. 9 Co. 78. 4 Leon. 44, &c. March 89.

(l) That they may maintain an Ejectment. 9 Co. 78. b. Poph. 190. Wentw. 95.

(Q) (a) What (b) Actions an Executor or Adminiſtrator ſhall have.

(a) By the Statute of 32 H. 8. c. 37. vide my ſecond Part 492. and the Notes thereon.
(b) Where Debt for Rent or other Duty lies for or againſt Executors. My ſecond Part 491.
(c) In the Original it is P. but ſeems it ſhould have been B. to make it agreeable with what follows.

1. IN an Action of Covenant by A. Executor of B. againſt C. upon Articles of Covenant upon a Deed made between B. and C. in which the Plaintiff declares upon the Deed, and ſhews the Deed at large, in which it is recited concerning the Sum of 2000 l. agreed to be paid by the ſaid C. for Money before received de domina D. P. the Wife of the ſaid (c) B. it is agreed by the ſaid Articles between the ſaid Parties, that there was remaining in the Hands of the ſaid C. of the ſaid Sum of 2000 l. the Sum of 1000 l. above divers particular Sums diſburſed by him to ſeveral Perſons there named by the Aſſent of B. and then B. covenants that the ſaid C. ſhall be ſaved harmleſs for the ſaid Money, remaining in his Hands touching a Suit in the Exchequer, and then C. covenants with B. quod pro tam longo tempore quali dicta ſumma 1000 l. remaneret in manibus dicti C. ipſe ſolveret ſeu ſolvi cauſaret dicto B. annuatim & quolibet anno ſummam 100 l. at ſeveral Feaſts by equal Portions half-yearly, the firſt Payment to begin at Michaelmas after, and after B. to whom the 100 l. is to be paid dies, it ſeems that the ſaid 100 l. ſhall be paid to the Plaintiff, the Executor of the ſaid B. at the ſaid Feaſt, ſo long as the ſaid Sum of 1000 l. ſhall remain in the Hands of C. for it appears upon the whole Deed, that the ſaid 1000 l. was the Money of B. in as much as it is recited, that it was delivered to C. per Dominam D. P. the Wife of B. who could not have any Money which was her proper Money. Alſo there is an Allowance made by B. of ſeveral Sums to C. and this Sum engaged by B. to ſave C. harmleſs from the Suit in the Exchequer; and it was the Intent of the Parties, that C. ſhould pay the ſaid 100 l. as long as the 1000 l. remained in his Hands, for the 100 l. was but Intereſt for the 1000 l. and in as much as the 1000 l. which was the Principal upon the whole Deed, appeared to be the Money of B. and after his Death belonged to A. his Executor, A. the Executor ſhall have the Intereſt ſo long as the 1000 l. remains in the Hands of C. in as much as the Principal belongs to him. Trin. 1649. between (d) Popham and Hunt, adjudged per Curiam upon Demurrer. Intratur Mich. 23 Car. B. R. Rot. 258.

(d) Style 140. ſeems to be S. C. but differs much in the Report.

2. If A. by his Deed acknowledges to B. that he hath in his Cuſtody an Obligation of 400 l. in which C. is bound to B. and that he will be ready ad omnia tempora cum inde requiſitus eſſet ad deliberandum prædictum Scriptum obligatorium præfato B. and after B. dies before any Requeſt made, and after E. the Executor of B. demands this Obligation of A. and he refuſes to deliver it, E. ſhall have an Action of Covenant upon this Deed, tho' the Covenant was to deliver it to the Teſtator upon Requeſt, which implies that the Requeſt ſhould be alſo by the Teſtator, in as much as the Thing it ſelf to be delivered, viz. the Obligation, goes to the Executor, and the Executor repreſents the Perſon of the Teſtator, as in Chapman's Caſe, Com. 286. and ſo it is in every * Action upon a collateral Promiſe. Paſch. 11 Car. B. R. between (e) Walker and Walker, adjudged per Curiam upon a Demurrer, where it was ſhewed for Cauſe, that no Demand was alledged to have been made by the Teſtator. Intratur Hill. 11 Car. Rot. 311.

* Fol. 914.

(e) My ſecond Part 230. pl. 8. S. C.

Against what Perſons.

3. **A Villein Executor may ſue his Lord for a Debt of his Teſtator, and Villenage is no Plea.** 21 Edw. 4. 50.

4. If by Indenture between *A.* and *B.* reciting that they held ſeveral Lands in Coparcenary, and had purchaſed other Lands jointly in Fee; each of them covenants and grants with the other and his Heirs, that if he ſurvived the other he would convey one Moiety to the Heirs of the Deceaſed, and one dies, his Heir may upon this Covenant have an Action againſt the Survivor upon his Refuſal, *&c. Trin.* 16 *Eliz.* between (a) *Wootton* and *Cooke*, *Dyer* 338. tho' objected the Covenant was not annex'd to the Land, but perſonal only, given to the Executor, and not the Heir.

(a) 1 And. 53, 54. S. C. adjudged, becauſe the Intent of the Covenant was to have the Inheritance conveyed, and therefore the Heir ought to have the Damages happening by the Non-performance.

5. If one ſells Lands to *A.* and his Heir, and covenants with *A.* his Heirs and Aſſigns, that he and they ſhall enjoy, *&c.* if *A.* be evicted and dies, the Executors of *A.* may have an Action, and not his Heir or Aſſign, for tho' not named in the Covenant, they repreſent the Perſon of the Teſtator. *Mich.* 23 *Car.* 2. between (b) *Lucy* and *Lovington*, 2 *Lev.* 26. adjudged.

(b) 1 Vent. 175, 176. S. C. adjudged, 2 Keb. 831, 832. My ſecond Part 235. pl. 1. S. C.

6. If a Biſhop makes a Leaſe, and the Leſſee covenants with the Biſhop and his Succeſſors to repair, and the Biſhop after dies, and another is made and dies, the Executor of the laſt Biſhop may have an Action thereon for Want of Repairs in the Life of his Teſtator. *Trin.* 1 *Will. & Mar.* between *Morly* and *Polhill*, 2 *Vent.* 56. adjudged.

(R) How they may be made.

1. **A Man may make an Executor by a nuncupative Will, and he may ſue.** (c) 4 H. 6. 1. Curia.

(c) Fitz. Executor 3.

2. If one makes an Infant his Executor, and appoints that during his Nonage *J. S.* ſhall have the (d) Diſpoſition of his Goods; *J. S.* is Executor during that Time. *Mich.* 31 & 32 *Eliz.* between *Pemberton* and *Cony*, *Cro. Eliz.* 164.

(d) By what Words an Executor may be made. Wentw. Off. of Exec. 12. Cro. El. 43.

(S) In

(S) In what (a) (b) (c) Manner they may be made.

(a) How limited or qualified in a ſpecial Manner. Wentw. 14.

(b) Where a Man made his Wife and another Executors, upon Condition, that if his Wife married, her Executorſhip ſhould ceaſe, and they filed a Bill, &c. and ſhe after married, and the other was obliged to bring a Bill of Revivor. 2 Chan. Rep. 77. (c) Where one deviſed a Leaſe to A. and willed, that if his Wife ſuffered the Deviſee to enjoy it for three Years, ſhe ſhould have all his Goods as Executrix; but if ſhe diſturbed A. then he made B. his Executor, ſhe is Executrix preſently until ſuch Diſturbance. My ſecond Part 18. pl. 19. which vide with the Notes there. (d) Fitz. Brief 11. S. C. Br. Condition 10. S. C. Br. Expoſition 7. S. C. Wentw. 15.

1. A Man may make two Executors, and that if they refuſe, two others ſhall be his Executors. (d) 3 H. 6. 6. b.

2. And in this Caſe, if the firſt two Executors adminiſter, the Two laſt ſhall not be Executors, nor named in Actions; but it is otherwiſe if the firſt Two refuſe. (e) 3 H. 6. 6. b. 7.

(e) Fitz. Brief 11. S. C. Br. Condition 10. S. C. Br. Expoſition 7. S. C. Went. 15.

(f) Wentw. 20 ff.

3. (f) If a Man makes three Executors, and commits the Adminiſtration to one only, whether they be all Executors, or only he to whom the Adminiſtration is limited, Dubitatur. 3 H. 6. 6. b. 7.

But the 19 H. 8. 8. b. is that it is ſo, becauſe the Limitation is void.

(g) Cro. Car. 293. S. P. per Cur', yet ſaid quoad Creditors, they are all as one Executor, and may be ſued as ſuch. Wentw. 17, 18.

4. (g) A Man may make an Executor for Part of his Goods, and another Executor for the Reſt. Hill. 17 Jac. B. between Auſtree and Audely.

(h) 3 Leon. 2, 3. S. C. and S. P. clearly reſolved.

5. If one makes *A.* and *B.* his Executors, but Wills that *A.* ſhall not meddle until he hath paid *B.* all Money due to the Teſtator, in ſuch Caſe *A.* is not Executor, nor can by Virtue of the Will adminiſter until he hath paid all ſuch Money. *Mich.* 1 & 2 *Ph.* & *Mar.* between (h) *Stapleton* and *Truelock*, *Moor* 11. *pl.* 44. held clearly *per totam Curiam.*

6. If one makes his Wife full and whole Executor of all his Cattle, Corn, and moveable Goods, this Enumeration of Particulars is no Excluſion of any other, eſpecially when no other Executor was made for the Reſidue, and *Catalla* in Latin extends to all Things. *Trin.* 7 *Car.* between *Roſe* and *Bartlet*, *Cro. Car.* 292, 293. by *Jones* and *Croke*, *contra Barkely*, *per quod adjornatur.*

(T) What Perſon may be an Executor, and to whom; what Perſons may have Executors or Adminiſtrators.

(i) 1 Rol. Abr. 912. pl. 4. vide ante with the Notes there.

1. D. 14 El. 309. 76. (i) No Adminiſtration committed of a Man becauſe he was attainted.

(k) Br. Teſtament 13. S. C.

2. A Woman, with the Conſent of her Husband, may make an Executor of Things which the Husband ſhall not have by her Death. (k) 18 E. 4. 11. b.

3. An Abbot cannot make Executors. 18 E. 4. 16.

4. A Woman may make an Executor with the Consent of her Husband. (a) 4 H. 6. 31. b.

(a) Fitz. Executors 5. S. C.

5. A Feme Covert may make an Executor of the Goods which she hath as Executrix, without the Consent of her Husband, if he will agree thereto afterwards. (b) 4 H. 6. 31. b. adjudged.

(b) Br. Executor 132. S. C. Br. Testament 9. S. C.

6. But a Feme Covert cannot make an Executor without the Assent of her Husband. Co. 4. Ognel 51. b. (c) 4 H. 6. 31. b. admitted.

(c) Br. Testament 9. S. C.

(d) Who may be Executors.

Fol. 915.

(d) This, tho' a distinct and new Title, is printed without any Letter before it, and the Placita continued as in Rolle.

7. (e) A Mayor and Commonalty may be Executors. 12 E. 4. 9. b. admitted.

(e) Wentw. Office of Exec. 24, 25. S. P. doubted.

8. A Brother professed may be an Executor with his Prior. 7 H. 4. 2. b.

9. (f) A Monk may be an Executor without the Assent of his Sovereign. 3 H. 6. 24. b. 18 H. 6. 4.

(f) Wentw. 22. S. P.

10. (g) A Villein may be an Executor to another. 18 H. 6. 4.

(g) Wentw. 23. S. P. 1 Rol. Rep. 147. Co. Lit. 124. a.

11. (h) And the Lord cannot take the Goods from him, for he hath them to the Use of the Testator. 18 H. 6. 4.

(h) Wentw. 23. S. P. 1 Rol. Rep. 147. Co. Lit. 124. a.

12. A Woman may make her Husband Executor of the Goods which she hath as Executrix if he will accept it. (i) 4 H. 6. 31.

(i) Fitz. Executors 5. S. C. Br. Testament 9. S. C.

13. Persons attainted, convicted, or outlawed, may be Executors. *Wentw. Office of Executors* 22.

14. So one excommunicated, for tho' such cannot proceed in a Suit till absolved, there being (k) Danger of Excommunication to all that converse with him, yet this makes not a Nullity of his Executorship, nor overthrows the Suit. *Wentw. Off. of Exec.* 24.

(k) Ante 295. pl. 2.

15. When the King is made an Executor, he appoints certain Persons to take the Execution of the Will upon them, against whom such as have Cause of Suit may bring their Action, and appointeth others to take the Account; and so was done when *Katherine*, Queen Dowager, Mother of *H.* 6. made her Will, and appointed him Executor thereof. 4 *Inst.* 335.

16. By the 3 *Jac.* 1. *cap.* 5. A married Woman, being a Popish Recusant Convict (her Husband being none) that doth not conform according to that Act by the Space of one Year before her Husband's Death, shall not be capable of being Executrix or Administratrix to her Husband and enjoying any Part of her Husband's Goods.

17. And by the same Act a Popish Recusant convict shall not be an Executor or Administrator.

(U) What Things an Executor ſhall have, and not the Heir.

1. IF a Deviſe be of Land to one and the Heirs of his Body for 500 Years, this is a Leaſe for Years, and therefore his Executor ſhall have it. Co. 10. (a) Loves 87.

(a) Ante 186. pl. 1. S. C. My ſecond Part 794. pl. 1. S. C. Wentw. 78.

2. All Leaſes for Years the Executors ſhall have.

3. The Executors ſhall not have the Deeds which concern the Inheritance, but the Heir.

4. And if the Deeds are in a Cheſt, the Executors ſhall have the Cheſt, and the Heir the Deeds. 18 E. 4. 3.

5. If the Teſtator recovers in Detinue for Deeds in a Box, the Executor ſhall have the Execution of this, and the Damages and Coſts, and not the Heir. (b) 19 E. 4. 6. b. adjudged.

(b) Br. Executor 139. S. C. Br. Charters de terre 60. S. C. Wentw. 133.

6. But if the Teſtator recovers a ſpecial Deed, the Heir ſhall have Execution of this and of the Damages, if the Deed cannot be had. 19 E. 4. 6.

7. If a Cheſt with Deeds (c) be ſhut, the Heir ſhall have the Cheſt alſo; but if it be not (d) ſhut, the Executor ſhall have the Cheſt. (e) 41 E. 3. 2. (f) 14 H. 4. 30.

(c) In the Original it is enclosed.
(d) In the Original it is enclosed.
(e) Fitz. Detinue 40. S. C. Br. Charters de terre 13. S. C.
(f) Fitz. Detinue 35. S. C. Br.

8. If a Man delivers a Deed to another to redeliver to him and his Heirs, not having any Title to the Land, his Heir ſhall not have this Deed, but his Executors, becauſe this was but a Chattel in him without Land. (g) 9 H. 6. 58. Curia.

(g) Fitz. Detinue 7. S. C. Br. 7. S. C. Br. Charters de terre 72. S. C.

9. If a Man be bound to a ſole Corporation and Succeſſor, where his Succeſſor cannot take, the Word Succeſſor is void, and his Executor ſhall have it. (h) 20 E. 4. 2.

(h) Br. Corporation 60. S. C.

10. Executors and Adminiſtrators ſhould have a Rent-charge, Villein, and Ward of the Body, which the Teſtator had for Years as Aſſets in Law. D. 3, 4 Ma. 140. 37.

11. The Executor ſhall have Relief due to the Teſtator. D. 3, 4 Ma. 140. 37.

12. (i) If a Man ſeiſed of a Ward dies, his Executors ſhall have it. 7 H. 4. 43.

(i) Wentw. Off. of Ex. 75, 77.

13. If a Biſhop Tenant by Knight-Service had died, his Heir within Age, neither the King nor his Succeſſor ſhould have had the Wardſhip, but the Executors of the Biſhop; for tho' the Biſhop had the Seigniory *in auter droit*, yet the Wardſhip being but a Chattel, he had it in his own Right, and a Chattel cannot go in Succeſſion of a ſole Corporation unleſs in the Caſe of the King. *Co. Lit.* 90. *a.* 388. *a.* and there ſaid that ſo it is of an Heriot, Relief, *&c.*

14. (k) But if a Church becomes void in the Life of a Biſhop, and ſo remains after his Death, the King ſhall preſent, and not the Executors or Adminiſtrators of the Biſhop; for nothing can be taken for the Preſentment, and therefore it is not Aſſets. *Co. Lit.* 388. *a.*

(k) 1 Leon. 235. S. P. but for this vide 2 Rol. Abr. 343. pl. 4.

(X) What Things they ſhall have as Aſſignees.

1. IF a Deviſe be of a Legacy to one and his Aſſigns, and the Deviſee dies before Payment, his Adminiſtrator ſhall have it as Aſſignee. Hill. 14 Jac. B. R. per Curiam.

2. If the Condition of an Obligation be, That if the Obligor pays 20 l. to ſuch Perſon as the Obligee by his Laſt Will in Writing ſhall appoint * it to be paid, then the Obligation to be void; and the Obligee appoints no Perſon to whom it ſhall be paid, but makes his Laſt Will and makes Executors thereby, yet the 20 l. (a) ſhall not be paid to his Executors, for here it appears that this was to be paid to an Aſſignee in Deed, to be made by the Obligee by his Appointment, and not to (b) an Aſſignee in Law. Hob. Rep. 14. between (c) Peaſe and Stileman, per Curiam.

* Fol. 916.

(a) But where Money was awarded to be paid to one or his Aſſigns before a certain Day, and he died before the Day, and yet it was held the Money ſhould be paid to his Adminiſtrator. 1 Leon. 316. —— Where Condition to pay Money to the Executors of the Obligee, and he dies Inteſtate, it ſhall be paid to his Adminiſtrators. My ſecond Part 28. pl. 5. (b) Co. Lit. 210, a. Wentw. Off. of Exec. 144. (c) My ſecond Part 29. pl. 2. S. C. which vide with the Notes there. 1 Brownl. 77. S. C.

(Y) (d) What Things ſhall go to the Executor or Adminiſtrator.

(d) Wentw. Off. of Exec. 74, 75, &c.

1. IF a Man poſſeſſed of a Leaſe for Years, deviſes the Benefit thereof to A. his Wife for ſix Years, and that J. my Son, if he comes home, ſhall have the Reſidue of the Term, and if he does not then come home within ſix Years, then W. my Son ſhall have it till J. does come home, and dies, and after W. dies within the ſix Years, and after J. does not come home within the ſix Years; tho' this was but a Poſſibility to have the Term, viz. if J. did not come home within the Years, and W. died before the Poſſibility happened, yet his Executors ſhall have it; for it was a Poſſibility fixed in the Teſtator, and only to be perfected by the Act of God, without any Act of the Parties; for this is not like a Leaſe to be named by J. S. for there is not any Perfection before the naming. Mich. 16 Jac. B. R. between (e) Shreeves and Wrottam, adjudged upon a Special Verdict.

(e) Cro. Jac. 509. adjudged per totam Curiam.

2. So if a Termor deviſes his Term to one and the Heirs Male of his Body, and if he dies without Iſſue Male, to J. S. and J. S. dies in the Life of the firſt Deviſee, yet the Poſſibility that he had to have the Term by the Deviſe ſhall go to his Executor for the Cauſe aforeſaid. Contra Trin. 8 Jac. B. R. Rot. 439. between (f) Price and Atmore adjudged.

(f) 4 Leon. 246. S. C. but varies in the Report, the Deviſe there being to his Wife, and if ſhe died during the Term, the ſame ſhould be to his Son and the Heirs of his Body; and the Son died before the Wife. Moor 831. pl. 1118. reported as in Leon. 1 Bulſt. 191. reported as in Leon. Cro. Jac. 510. S. C. cited, and denied to be Law, and the Reſolution in Lampet's Caſe, as to this Point held to be Law, which vide 10 Co. 51. b. and vide Moor 483, 807. 1 Bulſt. 193. 1 Rol. Rep. 357, 358. 1 Jon. 59. Wentw. 344. 1 Sid. 188. 2 Sid. 135, 151, 152.

3. If a Man leaſes Land to another for eighty Years, if he ſo long lives, and if he dies within the Term, that then immediately after

after his Death the Land ſhall remain to his Executors for twenty-one Years, and after the Leſſee dies Inteſtate, yet his Adminiſtrator ſhall have the Term for twenty-one Years, for the Adminiſtrator is within the Intent of the Grant. Trin. 43 El. B. R. between (a) Spark and Spark admitted.

(a) 2 Rol. Abr. 47. K. 6. S. C. 418. pl. 6. Cro. El. 658, 666, 840. S. C. adjourned; but in fol. 666. held it veſted in the Inteſtate himſelf, and ſo ſhould go to his Adminiſtrator, and Walmſley ſaid the Difference between this and Cranmer's Caſe in 14 Eliz. is becauſe it was there limited by Way of Uſe, and by the Party himſelf, ſo that he ſhewed his Intention, that it ſhould not veſt in himſelf, but his Executors, which Caſe vide Dyer 309. Moor 100. pl. 244. 1 And. 19. 2 Leon. 5, 6. 3 Leon. 20. but for this Diverſity vide Wentw. Off. of Executors 118. where ſaid that Cranmer's Caſe was but of little Authority. Co. Lit. 54. b. 4 Leon. 239.

4. If a Leſſee for Years of a Smith's Shop aſſigns it to B. and covenants with B. not to ſell Wheels for Coaches, to the Prejudice of A. or his Aſſigns, and after A. dies, and Adminiſtration is granted to his Wife, who continues the Trade in the Shop, and B. after ſells Wheels for Coaches to the Prejudice of the Adminiſtratrix, he hath broke his Covenant, for the Adminiſtratrix is an Aſſignee to have Benefit of this Covenant. Mich. 9 Car. B. R. between Hill and Hawes, adjudged upon a Demurrer. Intratur Trin. 9 Car. Rot. 1394.

(Z) What Things the (b) Heir ſhall have, and what the Executor.

(b) Anciently the Heir was permitted to have Debt on a Bond made to the Anceſtor and his Heirs, but the Law is not ſo holden at this Day. Co. Lit. 8. a.

1. (c) If a Man buys ſeveral Fiſhes, as Tenches, Carp, &c. and puts them for Store in his Pond, and dies, the Executor ſhall not have the Fiſh, but the Heir who hath the Water. Hill. 37 Eliz. B. R. between Gray againſt Pawlett and Bartholomew adjudged.

—— For many uſeful Caſes on this Point, vide Wentw. Off. &c. 81, 82, &c. 97, 98, 99. (c) Co. Lit. 8. a. S. P. becauſe at Liberty, and they cannot be taken but by Induſtry, as with Nets, &c. Partlet and Cray S. P. Cro. Eliz. 372. Goulſ. 129. Ow. 20. Wentw. 75, 81.

(d) So in Caſe of a Warren, Dovehouſe, &c. Kelw. 118.

2. If a Man dies ſeiſed of a (d) Park, the Heir ſhall have the Deer, and not the Executor. Hill. 37 El. B. R. per Popham.

(e) But where the Executor or Heir may be a Special Occupant, vide 2 Rol. Abr. 151. G. 1, 2, 3. and by the Statute 29 Car. 2. cap. 3. for Want of a Special Occupant, it ſhall go to Executors or Adminiſtrators.

3. If one have a Leaſe for three Lives to him and his Aſſigns, this is no Chattel, (e) nor ſhall go to the Executor, or Heir, but to him that firſt enters and claims it as an Occupant, in caſe no Aſſignment was made in the Life of the Leſſee. *Wentw. Off. of Exec.* 77.

4. Where one is ſeiſed in Right of his Wife of Land, and is attainted of Treaſon or Felony, the Profit thereof accruing to the Crown is but a Chattel; and tho' the King grant it to one and his Heirs, yet it ſhall go to his Executors. *Wentw. Off. of Exec.* 78.

5. If one poſſeſſed of Land for a Term of Years only, grants a Rent out of the ſame to *A.* and his Heirs, or the Heirs of his Body; yet the Rent ſhall go to his Executors, and not to any Heirs, for being derived out of a Chattel, it cannot be any Freehold or Inheritance, but is a (f) meer Chattel. *Wentw. Off. of Exec.* 29.

(f) So if one ſeiſed in Fee leaſes for Years, reſerving a Rent, and deviſes the Rent to A. and A. dies, his Executor and not his Heir ſhall have it. Dyer 5. b.

(A) (a) The Power of Executors before Probate.

Fol. 917.

(a) Wentw. Off. of Executors 49.

1. If an Obligee releaſes to the Executor of the Obligor before Probate of the Will, it is a good Releaſe if he proves the Will after. Paſch. 1 Jac. B. per Curiam.

2. (b) If an Executor before Probate of the Will brings an Action of Debt upon an Obligation due to him as Executor, but when he declares he ſhews it in Court proved, it being proved after the Action brought; yet the Action is well brought, becauſe he was Executor before Probate, tho' by Law he is not permitted to ſue before Probate, (c) yet this being proved, the Impediment is removed ab initio, for by his ſhewing the Will to the Court, he hath ſatisfied the Ceremony which the Law requires. (d) Mich. 16 Car. B. R. held by Barkely in a Writ of Error upon ſuch Judgment in the Court of Marſhalſea, where it was ſo adjudged upon a Special Verdict.

(b) For this Point vide Comb. 371. Diverſity taken by Holt between Executors bringing Action before Probate, and Letters of Adminiſtration granted to them. 5 Co. 28. a.

(c) Yet ſuch Arreſt is illegal, quoad Strangers, and the Defendants lying in Priſon thereon, &c. ſhall not make him a Bankrupt from the Arreſt. Vide my firſt Part 648. pl. 1. Skin. 23, 87. (d) 3 Lev. 38. S. C. cited, 1 Vent. 370. S. C. cited, Skin. 87. S. C. cited, and admitted to be Law. Raym. 481. S. C. cited.

3. (e) An Executor before Probate may releaſe an Action, becauſe the Right of the Action is in him, and yet before Probate he can have no Action. *Co. Lit.* 292. *b.*

(e) For this vide Pl. Com. 278. b. 281. a. 5 Co. 28. a. 9 Co. 39. a. 10 Co. 52. a. Hut. 31. 2 Mod. 108.

4. An Executor before Probate may do (f) all Things which to the Office of an Executor pertains, except only bringing Actions and proſecuting of Suits. *Wentw. Off. of Executors* 49.

(f) Dyer 367. pl. 39. 2 And. 191. Wolf and Dayton: Hut. 30. Palm. 53. Cro. Jac. 614. and vide Salk. 302, 303, 306.

(B) (g) What Acts will be an Adminiſtration to make (h) a Conſent to an Executorſhip.

(g) Wentw. Off. of Exec. 58.

(h) If he adminiſters before Refuſal, he cannot after refuſe, and what Acts ſhall be ſuch an Adminiſtration as to determine his Election. Wentw. Office of Executors 26, 27. Salk. 308.

Act in Law.

1. If an Executor uſes any Action for the Debt of the Teſtator, it ſhall be an Adminiſtration. (i) 8 H. 6. 36.

(i) Br. Adminiſtration 25. S. C.

2. If an Executor takes the Goods of the Teſtator, and converts them to his own Uſe, it is an Adminiſtration. (k) 20 E. 4. 17.

(k) Br. Adminiſtrator 35. S. C.

3. But if an Executor takes the Goods of the Teſtator taken from him by Wrong in his Life, it is no Adminiſtration. (l) 20 E. 4. 17.

(l) Br. Adminiſtrator 35. S. C.

4. If an Executor (a) happens of any Thing which was the Testator's, it is an Administration. (b) 24 E. 4. 5.

(a) In the Original it is hap.

(b) This is printed here as in the Original, but was a Miſtake there, for that Edw. 4. did not Reign twenty-four Years, and I ſuppoſe it ſhould have been 21 Edw. 4. 5. which vide Fitz. Executor 38. Br. Adminiſtrat. 36.

5. But (c) 41 E. 3. 31. the Claim of the Goods to his own proper Uſe, without Diſtribution for the Soul of the Teſtator is no Adminiſtration as Executor.

(c) Fitz. Executors 65. S. C.

6. If Executors grant any of the Chattels of the Teſtator, it is an Adminiſtration in Law. D. 3, 4 Ma. 135, 13.

7. (d) If an Executor releaſes to a Debtor of the Teſtator, it is an Adminiſtration in Law. (e) 11 H. 4. 84.

(d) 2 Brownl. 58. S. P. adjudged, and that he cannot after refuſe the Executorſhip.

(e) Br. Debt 65. S. C. Br. Executor 57. S. C.

8. So if he makes an Acquittance of any Debt of the Teſtator. (f) 8 H. 6. 36.

(f) Br. Adminiſtration 25. S. C.

9. If certain Goods are deviſed to an Executor, and he takes them without the Aſſent of the other Co-executor, it is an Adminiſtration, for that a Deviſee cannot take Goods deviſed without the Aſſent of the Executor. (g) 11 H. 4. 84.

(g) Br. Executor 57. S. C.

10. But otherwiſe it is if he takes them with the Aſſent by the Delivery of the other Executor. (h) 11 H. 4. 84.

(h) Br. Executor 57. S. C.

11. (i) If the Executor ſeiſes of the Goods of the Teſtator, it is an Adminiſtration. (k) 8 H. 6. 36.

(i) Stokes and Porter S. P.

1 And. 11. Moor 14. pl. 53. N. Bend. 74. pl. 115. Dyer 166. pl. 10. S. C.

(k) Br. Adminiſtration 25. S. C.

12. If the Executor ſeiſes the Goods of another Man to the Intent to adminiſter them, this ſhall be an Adminiſtration, tho' the Goods are after taken from him by the Owner, Dubitatur. (l) 8 H. 6. 35. b.

(l) Br. Adminiſtration 25. S. C.

13. If the Teſtator was Tenant at Will of certain Goods, and after his Death his Executor ſeiſes the Goods ſuppoſing them to be the Teſtator's, to have them adminiſtred, and after the Owner of the Goods takes them out of his Poſſeſſion, yet this ſhall be an Adminiſtration in Law, for his Intent appeared, Dubitatur. (m) 8 H. 6. 35. b.

(m) Br. Adminiſtration 25. S. C.

14. If an Executor being Commiſſary ſequeſters the Goods of the Teſtator, and does this as Commiſſary, this is no Aſſent to the Executorſhip. (n) 20 H. 6. 1. b.

(n) Fitz. Executor 15. S. C.

Fol. 918.

15. If a Man makes two Executors and dies, and one before Probate of the Will releaſes an Action to a Debtor of the Teſtator, this is a Conſent to the Executorſhip, ſo that he cannot after refuſe to adminiſter. Hill. 8 Jac. B. per Curiam, between Wilkinſon and Thomas.

16. If an Executor proves the Will, it ſeems that this is an Adminiſtration in Law, ſo that he cannot after plead Ne unque Executor. Dubitatur 26 H. 8. (o) 7. b.

(o) This is miſprinted here as in the Original, and ſhould be 8. a. which vide Br. Executor 5. Br. Adminiſtrator 2.

17. If A. makes two Executors and dies, and one proves the Will in the Name of both, againſt the Will of the other; this is not any Adminiſtration for him who did not conſent to the Probate, but he may plead Ne unque Executor, &c. for the Probate doth not make him Executor, if he doth not adminiſter. 26 H. 8. (p) 7. b.

(p) This is miſprinted here as in the Original, and I ſuppoſe ſhould be 8. a. which vide Br. Adminiſtrator 2. Executor 5.

18. If there be two Executors, and one of them only proves the Will, and the other by his Delivery and as his Servant takes and sells the Goods, this is no Administration by him who acted as Servant. *Mich.* 4 *Eliz.* between *Godfrey* and *Woodard*, *Cro. Eliz.* 858. adjudged.

(C) (a) What Thing or Act will make a Man an Executor *de ſon tort*.

(a) Wentw. Off. of Exec. 47.

1. (b) D. 8. 9 El. 255. 8. per Curiam, where the Defendant hath a Writ ad colligendum granted by the Commiſſary, in which Authority is given ad vendendum & venditioni exponendum bona inteſtati peritura, & quæ ſine detrimento ſervari non poſſunt, & ad compotum inde reddendum, by Force of which he ſells Grain called blend Corn; that this was ſuch an Adminiſtration by which the Defendant ſhould be charged of his own Wrong (c), for the Ordinary himſelf could not do this.

(b) Wentw. 250. S. P. and vide Kelw. 81.

(c) 8 Co. 135 b. 9 Co. 39. a. 2 Inſt. 398.

2. If a Woman after the Death of her Husband takes more of her Apparel than is convenient, ſhe ſhall be an Executrix of her own Wrong. (d) 33 H. 6. 31. b. D. 1 El. 166. 11.

(d) Fitz. Executors 24. S. C. Br. Executors 19. S. C.

3. But ſhe may take her Apparel which is convenient well enough. (e) 33 H. 6. 31. b. by Two, but there Quære D. 1 El. 166. 11.

(e) Fitz. Executors 24. S. C. Br. Executors 19. S. C. Wentw. 247.

4 (f) A Man may adminiſter ſeveral Goods of the Teſtator for the Expences of his Funeral, for this is Matter of Charity. (g) 33 H. 6. 31. b. D. 1 El. 166. 11. (h) 21 E. 4. 5.

(f) For this vide Wentw. Off. of Exec. 248.

(g) Fitz. Executors 24. S. C. (h) Br. Adminiſtrator 36. S. C. Fitz. Executor 38. S. C.

5. If a Stranger ſeiſes the Goods of a dead Perſon without doing any other Act, whether this Seiſure makes him an Executor of his own Wrong. Quære D. 1, 2 Ma. 105. 17. not (i) 21 Ed. 4. 5.

(i) Br. Adminiſtrator 36. S. C. Fitz. Executor 38. S. C.

6. A Woman Executrix adminiſters, and takes Husband, and they are after divorced cauſa præcontractus, and the Wife appeals from the Sentence, and pending this Appeal the Husband adminiſters the Goods, and the Wife dies, the Appeal not being determined, and the Adminiſtration of the Goods is granted to another, whether the Husband may be charged as Executor of his own Wrong for the ſaid Adminiſtration. D. 1, 2 Ma. 105. 17. Dubitatur.

7. A Man ſhall not be charged as an Executor of his own Wrong unleſs he does Things as Executor, as paying Debts of the Teſtator, or demanding the Debts of the Teſtator, or other ſuch Things. (k) 21 E. 4. 5.

(k) Br. Adminiſtrator 36. S. C. Fitz. Executor 38. S. C.

8. If none aſſumes upon himſelf to be Executor, nor takes Letters of Adminiſtration, the Uſer of the Things by any makes him Executor of his own Wrong. Co. 5. (l) Read. 33. b. reſolved.

(l) 2 Leon. 224. S. C. cited.

9. (m) The

(a) Stokes and Porter S. P. adjudged, 1 And. 11. Dyer 166. b. granted. Far. 31. per Holt.

9. (a) **The Law is the ſame** (b) **in the Caſe aforeſaid, if he takes the Goods into his own Poſſeſſion, which is the Office of an Executor or Adminiſtrator.** Co. 5. Read. 33. b. **reſolved.**

Moor 14. pl. 3. N. Bendl. 74. pl. 115.

(b) But otherwiſe if Adminiſtration was before

(c) Fitz. Executor 65. S. C. 2 Leon. 224. S. C. cited, Dal. 94. S. C. cited.

10. **But in** (c) 41 E. 3. 31. per Thorpe, **If a Man claims the Goods to his own proper Uſe, and does not diſtribute them for the Soul of the Teſtator, this is not an Adminiſtration to charge him as Executor; and it ſeems this is intended Executor** de ſon tort.

11. If an Executor be made, who proves the Will or takes upon him the Executorſhip, yet if a Stranger after takes any of the Goods and uſes them, or diſpoſes of them as his Own; this does not make him an Executor of his own Wrong, becauſe there is a rightful Executor who may be charged, and the Goods taken out of his Poſſeſſion after he hath adminiſtred are Aſſets in his Hands. *Read's* Caſe 33. *b.* 34. *a.* reſolved.

(d) N. Bendl. 12.

12. (d) But tho' there be an Executor who adminiſters, yet if a Stranger after takes the Goods, claiming to be Executor, pays Debts, receives Rents, or pays Legacies, and intermeddles as Executor there, for his expreſs Adminiſtration as Executor he may be charged as Executor of his own Wrong, tho' there be a rightful Executor. *Read's* Caſe, 5 *Co.* 34. *b.*

13. If Leſſee for Years in Reverſion dies Inteſtate, and his Wife aſſigns the Term, and after takes out Adminiſtration, and aſſigns to another, the firſt Aſſignment is void, for upon ſuch Term (e) no Entry could be made, nor could there be any Executor *de ſon tort* thereof. *Paſch.* 25 *Eliz.* between (f) *Kenrick* and *Burges*, *Moor* 26. *pl.* 273. *per Curiam.*

(e) **But where ſuch Termor dies Inteſtate, and one enters and poſſeſſes himſelf thereof, he thereby becomes Executor** de ſon tort. Parker **and** Sweetman, Style 406, 432. 2 Mod. 274. **Mayor and Commonalty of** Norwich **againſt** Johnſon, 3 Lev. 35. 3 Mod. 90. Comb. 7, 8.

(f) 2 Mod. 175. S. C. **cited,** 3 Mod. 91, 92. S. C. **cited.**

(g) **Where the Taking the Goods of an Inteſtate by Virtue of a void or fraudulent Gift made in his Life, will make one an Executrix of her own Wrong,** Stamford's **Caſe,** 1 Leon. 223. Dal. 94. Bethel **and** Stanhop. Cro. El. 810. 2 And. 172. Ow. 132. Haws **and** Loder, Yelv. 197. Cro. Jac. 271. 1 Brownl. 111, 112.

14. If an Executrix makes a (g) fraudulent Gift of all her Teſtator's Goods, and yet continues the Poſſeſſion thereof, and marries, and dies, and the Husband being poſſeſſed of Part thereof pays Legacies, he is chargeable as an Executor *de ſon tort*. *Hill*, 37 *Eliz.* between (h) *Wilcox* and *Watſon*, *Cro. Eliz.* 405. adjudged by all the Judges *contra Fenner.*

(h) Moor 396. pl. 518. S. C. **adjudged,** Goulſ. 116.

(i) 3 Mod. 90. S. C. **adjudged,** Comb. 7, 8 S. C. **adjudged.**

15. If Leſſee for Years dies Inteſtate, and one enters, he thereby becomes an Executor *de ſon tort*, and if he commits Waſte, the Leſſor may have an Action of Waſte againſt him. *Mich.* 33 *Car.* 2. between (i) The Mayor and Commonalty of *Norwich* and *Johnſon*, 3 *Lev.* 35. adjudged.

(D) The (a) Power of an Executor *de ſon tort*, or one who is not a lawful Executor.

(a) Tho' he cannot retain to ſatisfy his own Debt, yet upon Plene adminiſtravit he may give in Evidence Payment of juſt Debts, and Debts, &c. to in the Caſe of 3 Mod. 176.

1. IF an Ordinary grants Adminiſtration to another of the Goods of J. S. and after he himſelf adminiſters ſome of the Goods of the Teſtator, he may be charged * for this Adminiſtration tho' there be an Adminiſtrator, 12 R. 2. Adminiſtrator 21. but the Book is, that the Action was brought againſt him as Ordinary.

* Fol. 919.

tho' in an Action brought by the rightful Executor or Adminiſtrator he cannot plead Payment of the Value; yet upon the general Iſſue pleaded, ſuch Payments ſhall be recouped in Damages Whitehall and Squire, ſaid by Holt Ch. Juſt. Carth. 103, 104. which Caſe vide Skin. 274. Salk. 295. but for this vide 1 Sid. 76. (b) Wentw. Off. of Exec. 258.

2. If A. makes a Will, and J. S. Executor thereof, and after makes a later Will, and thereof makes J. D. Executor, and dies, and after J. S. proves the firſt Will in the Prerogative Court, and there this is allowed, decreed and publiſhed for a Will, and after J. S. adminiſters the Goods of the Teſtator by Force of this for half an Year after, and within this Time B. who was bound by Obligation of 100l. to the Teſtator, pays the Money to J. S. he not having Knowledge of any other Laſt Will, and thereupon J. S. gives him a Releaſe, and after the Probate of the firſt Will is repealed, and the Will it ſelf diſannulled, and the Laſt Will proved, (c) this Payment made and Releaſe is no Bar of an Action upon the ſaid Obligation by J. D. the laſt and true Executor, for that it does not lie in the Power of the Ordinary, to make another Executor than he who is made Executor by the Teſtator himſelf, and tho' it be miſchievous to him who pays the Money, and the Executor who proved the Will before he knew of the Laſt Will, yet the Miſchief would be as great of the other Part, if the Ordinary ſhould have Power to make another Executor than he who is the true Executor made by the Teſtator, and he ſhould have Power to diſpoſe of the Eſtate of the Teſtator. Mich. 16 Car. B. R. between Greves and Weigham, adjudged upon a Demurrer upon the Advice of all the Judges of Serjeants Inn. Intratur Hill. 15 Car. Rot. 1350. for the Ordinary hath no Power to grant Adminiſtration, or to give to any other Power to diſpoſe of the Eſtate of the Teſtator, where he had made an Executor. Com. 277. Gresbrook's Caſe.

(c) But vide Pl. Com. 282. b. Fitz. Executors 41.

3. If an Executor *de ſon tort* poſſeſſes himſelf of Goods of an Inteſtate and ſells them, and after takes out Adminiſtration, (d) this Sale is good by (e) Relation. *Paſch.* 25 *Eliz.* between (f) *Kenrick* and *Burgeſs*, *Moor* 126. *pl.* 273. agreed *per Curiam.*

(d) So where he had delivered them in Satisfaction of his own Debt, Whitehall and Squire, Skin. 274. by Dolben and Eyres, contra Holt. Carth. 103, 104. S. C. the Judges differing, but Judgment for the Defendant, contra Holt, ſo Salk. 295. ſo 3 Mod. 176. (e) That the Adminiſtration ſhall relate to the Death of the Inteſtate. Vide 2 Rol. Abr. 399. pl. 1. (f) 2 Mod. 175. S. C. and S. P. cited.

4. If the Widow of an Inteſtate takes his Goods into her Hands, and by the Direction of his Son ſells them, and the Son after takes out Adminiſtration and pays Debts of the Inteſtate to the Value; if an Action be after brought againſt the Wife as Executrix *de ſon tort* upon *Plene adminiſtravit* pleaded, and the Special Matter ſhewed in Evidence, the Iſſue ſhould be found for her, the Action being brought after the Adminiſtration granted, and when chargeable to the Adminiſtrator who had paid as far

far as the Goods of the Inteſtate amounted unto. *Mich.* 3 *Car.* between *Whitmore* and *Porter*, *Cro. Car.* 88. adjudged.

5. But ſaid, that if the Action had been brought againſt her before the Adminiſtrator had fully adminiſtred, it would have been otherwiſe. *Cro. Car.* 88, 89. *per Curiam.*

(E) (a) Executor of his own Wrong.

(a) Tho' not chargeable to Creditors further than he hath received, yet for his tortious intermedling the rightful Executor may have an Action againſt him, and ſhall recover Damages, tho' not according to the Value of the Goods, becauſe what he hath lawfully paid ſhall be recouped. Skin. 274. per Holt, Carth. 104. 1 Vent. 349.

1. If a Man dies Inteſtate, and a Stranger adminiſters of his own Wrong, and after Adminiſtration is granted to another, yet a Creditor of the Inteſtate may after charge the Stranger as an Executor of his own Wrong; becauſe there may be no Aſſets come to the Hands of the Adminiſtrator to ſatisfy his Debt, and he cannot charge the Adminiſtrator for thoſe Goods which never came to his Hands, but only to the Hands of the Executor of his own Wrong, and the Creditor hath no Means but in Chancery to compel the Adminiſtrator to bring his Action of Treſpaſs againſt the Executor of his own Wrong. Paſch. 13 Jac. B. between (b) Keble and Osbaſton, adjudged Co. 5. Read 34. reſolved. (c) Where a Stranger of his own Wrong adminiſters before the true Executor adminiſters or proves the Will.

(b) Hob. 49. S. C. adjudged. (c) For in ſuch Caſe the rightful Executor can be charged only with ſuch Goods as came to his Hands after he took upon him the Executorſhip. 5 Co. 34. a.

2. If one takes the Goods of an Inteſtate into his Hands, and after (d) he takes out Adminiſtration to him, yet a Creditor (e) if he pleaſes, may ſue him (f) as Executor of his own Wrong. *Hill.* 43 *Eliz.* between (g) *Bethel* and *Stanhope*, *Cro. El.* 810. *per totam Curiam.*

(d) So if Adminiſtration be taken out by another to whom he delivers the Goods, yet he may be charged as Executor of his own Wrong. Bradbury and Reynel, Cro. Eliz. 565. adjudged, 5 Mod. 137, 145. cited, and vide Noy 65. but vide Far. 31. per Holt. (e) He hath Election to charge him as one or other; for by his own Act having made himſelf chargeable as an Executor of his own Wrong, he cannot after diſcharge himſelf. Kelw. 127. 3 Leon. 197. Style 384. Lutw. 30. Dal. 43. Cro. El. 102. 2 Brownl. 185. (f) And if he pleads in Abatement, that he is Adminiſtrator and not Executor, the Plaintiff may reply, that before Adminiſtration he took Goods of the Inteſtate into his Hands, 2 Vent. 179, Lutw. 30. 2 Mod. 168, 292, 293. (g) 2 And. 172. S. C. Ow. 132. S. C.

3. If a Stranger poſſeſſeth himſelf of the Inteſtate's Goods, and after Adminiſtration is granted to a Creditor, he may bring an Action for his Debt againſt the Stranger, as Executor of his own Wrong; and the Taking out Adminiſtration doth not hinder him from bringing this Action, the Goods being taken away before the Adminiſtration granted. *Trin.* 1653. between (h) *Aſhby* and *Child*, *Style* 384. adjudged.

(h) 1 Rol. Abr. 940. pl. 5.

Executors.

(F) (a) Who ſhall be chargeable as Executors.

(a) Poſt Letter H. in what Actions an Executor may be charged, vide.

1. AN Executor of his own Wrong ſhall be bound to pay Legacies as well as Executors of Right. Mich. 3 Jac. B. R. (b) by Popham and Williams. Hill. 7 Jac. B. between Philpot and others, per Curiam, a Prohibition denied upon ſuch Suit.

(b) Noy 13. S. P. by Popham and Williams, Yelverton doubting.

2. If a Woman Executrix takes Husband, who waſtes the Goods, and the Wife dies, by the Common Law there is no Remedy againſt the Husband. Mich. 3 Jac. B. R. by Popham and Williams.

3. But in this Caſe (c) by the Eccleſiaſtical Law, the Husband ſhall be puniſhed and compelled to make Execution. Mich. 3 Jac. B. R. (d) by Popham and Williams. Mich. 8 Jac. B. Prohibition denied.

(c) Winch 65.

(d) But vide 2 Rol. Abr. 298. pl. 3. and the Notes there, and vide 1 Sid. 181.

4. (e) If an Executor waſtes the Goods, and dies, (f) his Executor ſhall not be charged for them, for actio perſonalis moritur cum perſona. Hill. 7 Jac. B. held.

Fol. 920.

(e) 3 Leon. 241. S. P. agreed by the Barons, that he ſhould not be charged, even in the Caſe of the King. Brown and Collins, S. P. 2 Lev. 110. 1 Vent. 292. But vide Wentw. Off. of Exec. 232, 233.

(f) But vide 30 Car. 2. cap. 7. made perpetual by 4 & 5 W. & M. and tho' by the Words of the enacting Part it ſeems only to extend to Executors and Adminiſtrators of Executors de ſon tort, yet it extends to Executors, &c. of rightful Executors or Adminiſtrators who have waſted. 3 Mod. 113. 2 Vent. 40. but for that vide 4 & 5 Will. & Mar. cap. 24. par. 12.

5. (g) If an Executor of his own Wrong waſtes the Goods, and dies, his Executor (h) ſhall not be charged. Hill. 7 Jac. B. held, becauſe actio perſonalis moritur cum perſona.

(g) 2 Mod. 293, 294. S. P. adjudged, but Lord Chancellor ſaid, he would relieve in Equity.

(h) But vide 30 Car. 2. cap. 7. made perpetual by 4 & 5 Will. & Mar. cap. 24.

6. If an Executor *durante minore ætate* waſtes the Goods after the Age of the Infant, he ſhall be charged (i) upon the Special Matter, and not as an Executor of his own Wrong (k), becauſe he had a lawful Authority to that Time. Between (l) *Palmer* and *Litheland*, *Noy* 86. adjudged.

(i) Vide Hob. 266. Latch 267.

(k) So if one ſells Goods by Order of an Infant Executor. Cro. El. 255.

(l) Latch 267. ſeems to be S. C. but the Caſe was of Waſte before the Adminiſtration repealed and granted to another.

7. By the Statute of the 43 *Eliz. c.* 8. if one obtains Goods or Debts of an Inteſtate, or any Releaſe or Diſcharge of any Debt or Duty to him belonging, by procuring by Fraud Adminiſtration to be granted to a Stranger of mean Eſtate, and without a valuable Conſideration from him, taking ſuch Grant or Releaſe, he ſhall be chargeable as Executor of his own Wrong, ſo far as the Value of the Goods or Debts ſo obtained or releaſed ſhall amount unto, but may deduct Money owing to him from the Inteſtate, and other Payments by him made, which lawful Executors or Adminiſtrators ought to have made.

(G) (a) (b) What ſhall (c) (d) be (e) ſaid Aſſets.

(a) That a Leaſe for Years by a Copyholder made, with the Licence of the Lord, ſhall be Aſſets in the Hands of the Executor of the Leſſee, vide Poph. 188. contrary to a Caſe there cited.

1. If a Man enfeoffs another, upon Condition that he ſhall ſell the Land, and expend the Money for his Soul, &c. this ſhall not be Aſſets after the Death of the Feoffor where the ſame Feoffee is made Executor. (f) 2 H. 4. 21. b. Dubitatur 3 H. 6. 3. b.

(b) Vide Wentw. Off. of Exec. 105, 106, &c. throughout the whole Chapter. (c) If an Executor hath Goods of the Teſtator in any Part of the World, he ſhall be charged in Reſpect thereof. 6 Co. 47. Cro. Jac. 55. Hard. 64. (d) What Things ſhall go to Executors or Adminiſtrators, vide ante 367. 1 Rol. Abr. 934. pl. 9. vide, and the Notes there. (e) Where a Term extinguiſhed may yet be Aſſets. (f) Fitz. Executors 51. S. C.

(g) Fitz. Executor 1. S. C.

2. But if a Man makes J. S. his Executor, and after infeoffs him to ſell the Land and diſtribute the Money for his Soul, and after dies, and after he ſells the Land, theſe Monies ſhall be Aſſets. (g) 3 H. 6. 3. b.

(h) But yet the Profits before Sale ſhall not, unleſs ſo provided by the Will. Co. Lit. 113. a. Co. Lit. 236. a. 2. S. C.

3. So if a Man deviſes Land to J. S. to be ſold, and to diſtribute the Money for his Soul, and at the ſame Time he makes him Executor, and dies, and after he ſells, (h) theſe Monies ſhall be Aſſets, tho' they were never in the Hands of the Teſtator. (i) 3 H. 6. 3.

(i) Fitz. Executors S. C. Br. Aſſets inter mains

(k) Wentw. 100. vide Yelv. 33. Hob. 38.

4. (k) If an Executor recovers Damages in (l) Treſpaſs de bonis aſportatis in (m) vita teſtatoris, this ſhall be Aſſets, for that he recovers it as Executor. (n) 3 H. 6. 3. b.

(l) In a Quare impedit. Sav. 119. (m) But Goods taken after the Death of the Owner are Aſſets in the Hands of his Executors or Adminiſtrators before any Satisfaction recovered. Ow. 132. Cro. El. 810. (n) Br. Aſſets inter mains 2. S. C. Co. Lit. 124. a. 1 Leon. 225.

(o) Moor 858. pl. 1178. S.C. adjudged,

5. If an Executor recovers as an Executor Things in Chancery by Equity, theſe Things ſo recovered ſhall be Aſſets. Trin. 12 Jac. between (o) Harwood and Wraynam, adjudged Trin. 12 Jac. B. R. per Curiam.

1 Rol. Rep. 56. S. C. adjudged, 1 Brownl. 76, 77. S. C. Noy 67. S. C. cited, 6 Co. 47. a.

(p) 1 Lev. 224. S. P. Hard. 405. S. P. and vide Hardr. 74.

6. (p) If a Man deviſes Lands to be ſold by J. S. for Payment of his Debts and Legacies, and makes J. S. his Executor, and dies, the (q) Money made by J. S. upon the Sale of the Land ſhall be Aſſets in his Hands. Trin. 17 Jac. B. per Hobart.

(q) If Lands are deviſed to Executors for three Years for Payment of Debts, it is Aſſets in the Hands of the Executors; but if Lands are deviſed to be ſold for Payment of Debts, it is no Aſſets before ſold. 1 Brownl. 34. 2 Brownl. 47. Wentw. Off. of Exec. 105.

7. But otherwiſe it is where the Land is deviſed to be ſold by the Executor and others, for there the Money ſhall not be Aſſets, for they are not truſted therewith as Executors. Ibidem per Hubart.

(r) Br. Aſſets inter mains 8. Godb. 304. 4 Leon. 103.

8. If an Executor delivers Goods to merchandize, the (r) Profit thereof ſhall be to the Uſe of the Teſtator. 18 H. 6. 4. Wentw. Office of Exec. 119. 2 Brownl. 77.

9. If a Man deviſes Lands held in Socage to be ſold by his Executor, and that the Money thereof coming (a) ſhall be diſpoſed in Legacies ſpecially expreſſed in the ſame Will, if the Executor after his Death ſells the Land for Money, this Money ſhall be Aſſets in his Hands (b) to the Legacies. D. 9. 264. 41. per Curiam.

(a) Vide 2 Rol. Abr. 284. pl. 28.
(b) But not for Payment of Debts.

1 Leon. 87. 2 Leon. 119. Wentw. Off. of Exec. 105.

10. So if a Deviſe be of ſuch Land to his Executor upon Condition to ſell it, and with the Money thereupon accruing, and alſo with his perſonal Eſtate to pay his Debts, and gives Power by the ſame Will to his Executor to ſell it accordingly, &c. and after the Executor ſells it accordingly, the Money received upon the Sale ſhall be Aſſets to the Debts. Trin. 23 Car. B. R. between Shawe and Huntley, adjudged upon a Special Verdict. Trin. 21 Car. Rot. 321. London.

11. If the Debtee dies Inteſtate, and the Ordinary commits Adminiſtration to the Debtor, (c) by which the Debt is extinct; yet it ſhall be Aſſets in his Hands. Trin. 7 Jac. B. per Curiam agreed, for the Ordinary hath no Power to diſcharge the Debt.

(c) That in ſuch Caſe the Debt is not extinct. Vide 1 Rol. Abr. 934. pl. 2.

12. (d) If the Debtee makes the Debtor and a Stranger Executors, by which the Debt is extinct in the Hands of the Debtor, yet it ſhall be Aſſets in his Hands to Debts, for this is extinct but by the Will. 8 E. 4. 3. Com. Woodward and Darcy 185.

(d) Wentw. Office of Exec. 45. Yelv. 160.

13. (e) So if the Debtee makes the Debtor Executor, and dies, by which the Debt is extinct * in the Hands of the Debtor; yet it ſhall be Aſſets, for that this is extinct but by the Will. Trin. 7 Jac. B. between Holliday and Boas held.

(e) Wentw. * Fol. 921. Off. of Exec. 45. Yelv. 160. Salk. 304.

14. If the Teſtator was indebted to the King in 13 l. and the King ſeiſed the Goods of the Teſtator in the Hands of the Executor for the ſaid Debt, and after the Executor pays the 13 l. and hath the Goods redelivered, the Value of the Goods above the Sum of 13 l. ſhall be Aſſets to other Debts. 17 E. 3. 26. b. admitted by the Iſſue.

15. If a Man makes A. his Executor during the Minority of B. and makes B. his Executor after his full Age, and after B. comes to full Age and takes upon him the Executorſhip of the Will, the Goods of the Teſtator which are in Specie in the Hands of A. after the Executorſhip of B. are Aſſets in the Hands of B. tho' B. never had the Poſſeſſion thereof, for he may have Trover and Converſion for them againſt him. Trin. 17 Jac. B. between (f) Chandler and Thomſon per Curiam.

(f) Hob. 265. ſeems to be S. C.

16. (g) If an Executor hath a Villein for Years, who purchaſeth Lands in Fee, and the Executor enters, he ſhall have the whole Fee-ſimple, but becauſe he had the Villein as Executor, it ſhall be Aſſets in his Hands. *Co. Lit.* 117. *b.* 124. *a.*

(g) Godb. 30. S. P. by Anderſon. Wentw. Off. of Exec. 104 S.P.

17. If Money is brought into the Prerogative Court, and there delivered to the Executor as due to the Teſtator, and preſently after in the ſame Court, by Order thereof, and the ſame Day, he pays it to a Creditor of the Teſtator, and after ſuch Payment, and upon the ſame Day another takes out a Writ, upon *Plene adminiſtravit* pleaded, this Money will be taken to be Aſſets, tho' perhaps by Special Pleading the Defendant might have been aided. *Mich.* 3 & 4 *Eliz. Dyer* 208. *pl.* 16.

18. A Bond to the Teſtator in the Hands of an Executor is not Aſſets (a) till (b) recovered, becauſe but a Choſe in Action; but if an Executor releaſes the Debt, he hath made it Aſſets in his Hands to the Value of the whole Bond. *Mich.* 15 *Eliz. Ow.* 36.

(a) Upon Plene adminiſtravit all ſperate Debts mentioned in the Inventory are accounted Aſſets in the Hands of the Executors; for it will be preſumed they might have been had for demanding, unleſs a Demand or Refuſal be proved. Salk. 296. Comb. 342. (b) So is the Book, but I ſuppoſe the Money muſt be intended to be received, for if an Executor obtains a Judgment, the Money recovered is not Aſſets till levied by Execution. Salk. 207.

19. Goods diſtrained or impounded are not Aſſets in the Hands of an Executor. *Mich.* 25 *Eliz. Cro. Eliz.* 23. adjudged.

20. If an Executor after he comes of full Age proves the Will, and releaſes all Actions to him who was Adminiſtrator during his Minority, and who then had Goods in his Hand of the Teſtator's, (c) this is Aſſets in the Hands of the Executor, for the Law preſumes he hath received as much as he releaſed. *Mich.* 27 & 28 *Eliz.* between (d) *Brightman* and *Keighley*, *Cro. Eliz.* 43. adjudged, but ſaid by *Periam*, that if an Executor releaſes an Account, and it was uncertain what he ſhould recover, it is not Aſſets; but if it can appear or be proved, that ſo much was due, it is Aſſets.

(c) A Releaſe is as good a Satisfaction in Law as a Satisfaction in Deed, and therefore if an Executor releaſes, the Debt releaſed is judged Aſſets in his Hands. Hob. 66. (d) Kightley and Kightley, 4 Leon. 102, 103. S. C. adjudged, and the Diverſity taken where the Account was certain or uncertain denied unleſs ſuch as could not be proved to Court or Jury. Godb. 30. S. C. adjudged, 1 And. 138. S. C.

21. If an Executor puts in Suit a Bond of 100 *l.* for Performance of Covenants, and the Parties ſubmit to an Award, and it is awarded that the Obligor ſhall pay 70 *l.* in full Satisfaction, and that the Executor ſhall releaſe, which is done accordingly, the Executor ſhall be taken to have Aſſets to the Value of the whole 100 *l.* and tho' by the Award compelled to releaſe, (e) it was his own Act to ſubmit to the Arbitrament. *Mich.* 15 *Eliz.* 3 *Leon.* 53. adjudged.

(e) So if an Executor takes a Security in his own Name for the Teſtator's Debt, or compounds a Debt or Damages for leſs, &c. Norden and Levit, 2 Lev. 189. 3 Keb. 597, 615, 691, 706, 742, 776, 778.

22. If a Treſpaſſer takes Goods in the Life of the Owner, ſo that they were never more than a Choſe in Action to his Executor or Adminiſtrator, they are not Aſſets till recovered. *Hill.* 43 *Eliz.* between (f) *Bethel* and *Bethel*, *Cro. Eliz.* 810.

(f) Ow. 132. S. C. 2 And. 172. S. C.

(g) Ow. 132. S. P. 2 And. 172. S. P. but vide Wentw. Off. of Exec. 157, 158, &c.

23. Otherways if taken after his Death. (g) *Cro. Eliz.* 810.

24. If *A.* for Money due from the King takes a Debenture in the Name of *B.* and *A.* makes *C.* his Executor, and dies, and *C.* procures *B.* to releaſe and ſurrender this, and for the ſame Money *C.* takes a new Debenture to himſelf, this is no Aſſets in the Hands of *B.* nor *Devaſtavit* in *C.* the Executor. Between (h) *Evelyn* and *Leveſon*, *Goulſ.* 115. adjudged.

(h) Noy 67. S. C. adjudged, becauſe it was only a Truſt between A. and B. and there was no Remedy but in Chancery.

25. If an Executor being of (i) full Age, upon Receipt of all Principal and Intereſt due, releaſes the Bond, it is no *Devaſtavit*, and Aſſets only for the Money received, becauſe nothing done, but what in good Conſcience ought to be. *Mich.* 13 *Car.* 2. in the Caſe of *Knyveton* and *Latham*, *Cro. Car.* 491. *per Brampſton* Ch. Juſt. and *Damport* Chief Baron, agreed.

(i) Otherwiſe if under the Age of Twenty-one. My ſecond Part 771. pl. 2.

26. If Money due to the Teſtator is paid to a Stranger by Conſent of the Executor, it is Aſſets in his Hands immediately; and if without ſuch Conſent, and he after brings an Action for it againſt the Receiver (by which he agrees to the Receipt), and recovers, it will be Aſſets immediately without Execution, for the original Debtor is thereby diſcharged. *Hill.* 2 *Ann.* between (a) *Jenkins* and *Plume*, *Salk.* 207. *per Curiam.*

(a) 6 Mod. 91, 92, &c. 181. S. C. adjudged.

27. If Executor of Leſſee for Years enters, and receives the Profits, (b) yet no Part thereof will be Aſſets unleſs what is over and above the Rent; but is received by the Executor as Tertenant, and appropriated to the Uſe of the Leſſor. *Trin.* 9 *Ann.* between *Buchly* and *Perk*, 1 *Salk.* 79.

(b) But for this vide my ſecond Part 504. pl. 10. and the Notes there.

28. If *A.* takes a Bond in Truſt for *B.* and dies, this is not Aſſets in the Hands of the Executors of *A.* *Trin.* 2 *Ann.* between *Deering* and *Torrington*, *Salk.* 79.

29. So if the Obligee (c) aſſigns over a Bond, and covenants not to revoke it, and dies, this is not Aſſets in the Hands of the Executors of the Obligee. *Salk.* 79.

(c) I ſuppoſe this is intended of an Aſſignment for a valuable Conſideration,

30. By the Statute of 29 *Car.* 2. *cap.* 3. *par.* 12. an Eſtate *pur auter vie*, if there be no Special Occupant thereof ſhall go to the Executors or Adminiſtrators of the Party that had the Eſtate by Virtue of the Grant, and ſhall be (d) Aſſets in their Hands.

(d) Yet whether it ſhould be ſo for Payment of Legacies, unleſs particularly charged therewith, is doubted in the Caſe of Oldham and Pickering. Carth. 376. Salk. 464. Comb. 388.

Executor.

(e) (f) (H) In what (g) Actions an Executor may be charged.

(e) Vide ante Letter F. who ſhall be chargeable as Executors.

(f) Wentw. Off. of Exec. 182.

(g) Where in the Debet and Detinet

1. (h) If a Gaoler ſuffers a Man to eſcape who is in Execution, and dies, his Executor ſhall not be charged in Debt for it, becauſe they ſhall not be charged without Specialty. (i) 41 Aſſ. 15. adjudged, D. 15 El. 322. 25.

upon a Suggeſtion of a Devaſtavit. My ſecond Part 503. pl. 5. vide, and the Notes there.

(h) Wentw. 182. S. P. 9 Co. 87. a. S. P. 2 Inſt. 382. Goulſ. 90. Hard. 31.

(i) Noy 44. S. C. cited.

2. If a Sheriff levies Monies upon a Fieri facias upon an Execution upon a Judgment, and does not deliver them to the Plaintiff in the Action, and dies, an Action of Debt lies againſt his Executor (k), becauſe this is not grounded upon a Wrong, which is called Maleficium, ſcilicet, a meer Tort, but upon a Contract in Law, ſcilicet, by the Receipt of the Money by which a Debt accrues to the Plaintiff by Implication of Law, upon a Contract in Law, and therefore an Action of Debt lies againſt him as well as againſt the Teſtator. Paſch. 15 Car. B. R. between (l) Packinton and Aſſumpſit. Cro. El. 207. 8 Co. 97. a. 94. Noy 44. vide with the Notes there.

(k) Where an Executor is not chargeable for a perſonal Tort of his Teſtator, but is upon his Contract or

(l) My ſecond Part 495. pl. 17. S. C. which

Culliford,

Culliford, adjudged per Curiam, this Matter being moved in Arreſt of Judgment.

3. By 30 *Car.* 2. *cap.* 7. it is enacted, That Executors or Adminiſtrators of any Perſon or Perſons, who as Executor or Executors of their own Wrong, or Adminiſtrators, ſhall waſte or convert Goods, *&c.* to their own Uſe, (a) ſhall be chargeable in the ſame Manner as their Teſtator inteſtate would have been if living.

(a) That they were not before chargeable, vide the Recital of the Act. 1 Rol. Abr. 920. pl. 5. 3 Leon. 241. 2 Lev. 110. 1 Vent. 292. 2 Mod. 293. 2 Lev. 133. 3 Keb. 533.

4. By 4 *&* 5 *W.* *&* *M.* *cap.* 24. *par.* 12. the Act of 30 *Car.* 2. is made perpetual, and for as much as it had been a (b) Doubt, whether that Act extended to Executors or Adminiſtrators of any Executor or Adminiſtrator of Right, who for Want of Privity were not before anſwerable, nor could be ſued for Debts due by the firſt Teſtator or Inteſtate, notwithſtanding ſuch Executors or Adminiſtrators had waſted the Eſtate of the firſt Teſtator; it is enacted, that Executors or Adminiſtrators of ſuch Executors or Adminiſtrators of Right who ſhall waſte, *&c.* ſhall be chargeable in the ſame Manner as their Teſtator or Inteſtate ſhould or might have been.

(b) Vide 3 Mod. 113. 2 Vent. 40.

Executor.

(I) In an Action againſt Executors, how the Plaintiff ought to demean himſelf.

For the Debt of the Teſtator.

1. IN an Action upon the Caſe upon a Contract made by the Teſtator, the Plaintiff need not aver that the Defendants have Aſſets to pay Legacies. Co. 9. Pinchon 90. b. Com. Norwood and Read 182. b. adjudged.

2. (c) 30 El. Co. 9. 90. b. In an Action upon an Aſſumpſit by the Teſtator for Payment of a Debt, adjudged (d) that he need not (e) aver, that the Executor hath Aſſets to ſatisfy the Debts of the Teſtator.

(c) 2 Brownl. 137, 138. S.C. adjudged, Cro. Jac. 293, 294. S. C. adjudged.

(d) But where the Plaintiff need not aver that the Defendant hath Aſſets. My firſt Part 53. pl. 33. which vide with the Notes there. Moor 853. pl. 1167. 1 Bulſt. 41. 2 Bulſt. 92. Hut. 28, 108. Cro. Jac. 273. (e) And where the Plaintiff need not on ſuch Promiſe prove, that the Defendant hath Aſſets. 2 Bulſt. 278. Hut. 28. and vide my firſt Part, pl. 53. and the Notes there. —— But if a Bailiff promiſes to pay the Debt of his Maſter out of the Rents due at Michaelmas next, if he would give him a Month's Time after; and it doth not appear he had received any, he ſhall not be charged. Davilon and Heſlop, 2 Lev. 20. adjudged, 1 Vent. 152. adjudged, Ray. 211, 212. adjudged, and vide Hard. 163.

Upon an *Aſſumpſit* by the Executor.

3. Co. 9. Bane 94. The Executor promiſes to pay a Debt due by the Teſtator, at Michaelmas, if he would forbear to ſue him before; in an Action upon this Promiſe the Plaintiff need not aver, that the Executor had Aſſets to the Value of the Debt at the Time of the Promiſe, for the Law intends he had.

4. In a *Scire facias* by an Adminiſtrator brought upon a Recognizance in Chancery, (a) there needs no *profert in Curia* of the Letters of Adminiſtration, becauſe the Writ is founded upon a Record. *Mich.* 39 & 40 *Eliz.* between the Earl of *Shrewsbury* and Sir *Walter Lewſon*, *Cro. El.* 592. adjudged.

(a) 1 Sid. 249. — Where the Courſe is to ſuggeſt upon the Roll, after the Writ comes in, that Adminiſtration was granted to him. 6 Mod. 156. per Holt. As to Executors, vide Carth. 69.

5. (b) When one ſues (c) as Executor, (d) he muſt in his Declaration ſhew forth the Teſtament to intitle him to the Action. *Paſch.* 39 *El.* between (e) *Edwards* and *Stapleton*, *Cro. Eliz.* 551. adjudged, and for Want thereof Judgment arreſted after a Verdict for the Plaintiff.

(b) Cope and Lewin S. P. Hob. 38. 1 Brownl. 9. Browning and Fuller S. P. Cro. Jac. 299. adjudged, and that it was Matter of Subſtance, and not Form only. 1 Brownl. 200. —— But whether Subſtance or Form, vide Hob. 233. Cro. Jac. 556. 2 Saund. 402. 1 Sid. 249. (c) Diverſity where upon his own and where upon the Poſſeſſion of his Teſtator. Wentw. Off. of Exec. 51. 2 Rol. Rep. 428. Hob. 218. (d) Where the Want thereof is helped by Defendant's Pleading thereto. 1 Salk. 37, 38. 6 Mod. 135. Comb. 465. (e) Noy 63. S. C. adjudged.

6. In an Action againſt one as Adminiſtrator, the Plaintiff ought to ſhew by whom the Adminiſtration was committed, for as he takes Conuſance he is Adminiſtrator, ſo he may by whoſe Means he was made ſo; and if he be not Adminiſtrator, he may be charged as Executor *de ſon tort*. *Paſch.* 1 *Jac.* between (f) *Wade* and *Atkinſon*, *Cro. Jac.* 10. and for Want thereof a Judgment was upon a Writ of Error in the Exchequer Chamber reverſed by the Opinion of all the Judges.

(f) 2 Jon. 1. S. C. cited, yet there in the Caſe of Thorold and Bayly it was adjudged upon Demurrer, that the Allegation in the Declaration, that Adminiſtration was debita juris forma committed to the Defendant, without ſhewing by whom, was ſufficient, and vide 1 Sid. 228. Diverſity where one declares as and where againſt an Adminiſtrator, and vide Goulſ. 97. Style 463, 464. 1 Lutw. 1301. 2 Vent. 84. 5 Mod. 465.

7. If one brings an Action of Debt as Adminiſtrator, and thereupon hath a *Capias* and *Exigent*, and the Defendant is outlawed and taken upon a *Capias Utlegatum*, and after ſuffered to eſcape, the Plaintiff may have an Action for this Eſcape without ſhewing who committed Adminiſtration, or that he had Authority ſo to do, or that it was (g) *in retardationem Teſtamenti*. *Mich.* 12 *Jac.* between (h) *Barret* and *Winchcomb*, *Cro. Jac.* 360. adjudged.

(g) All. 1. (h) 1 Rol. Rep. 78. S. C. adjudged, the Action being brought as Executor, and Declaration, that he was in Execution at the Suit of the Teſtator. Hob. 38. S. C. cited, and ſaid the Eſcape was a Wrong to the Executor himſelf, tho' the Damages recovered ſhall be Aſſets in his Hands.

8. If one brings an Action as Adminiſtrator, (i) he muſt make a *Profert in Curia* of his Letters of Adminiſtration (k) by which he is intitled to the Action. *Mich.* 14 *Jac.* between (l) Sir *John Cuts* and *Bennet*, *Cro. Jac.* 409, 412. held Matter of Subſtance, and for Want thereof Judgment reverſed (m) after a Verdict for the Plaintiff.

(i) Diverſity where one brings an Action, and where one pleads an Adminiſtration in Bar. Cart. 227. per Vaughan. (k) 6 Mod. 242. (l) Cro. Jac. 556. S. C. cited. (m) Vide 1 Sid. 98. Style 236, 282. A Verdict did not help, becauſe not neceſſary to be proved on the Trial, but it is now remedied by 16 & 17 Car. 2. Salk. 38. 4 Mod. 133. Comb. 196.

9. (n) If an (o) (p) Archdeacon commits Adminiſtration, it need not be ſhewed by what Authority, for he is *oculus Epiſcopi & de jure ordi-*

(n) Style 54. S. P. adjudged, 1 Lev. 193. S. P. per Curiam. (o) So if granted by an Official. Cro. El. 102. 2 Mod. 65. —— By Commiſſary. 1 Lutw. 9. —— By Chancellor. Lit. Rep. 79, 80. 1 Leon. 312. Hetl. 68. —— Per Vicarium generalem in Spiritualibus Epiſcopi B. &c. 1 Leon. 312. (p) If granted by Dean, it muſt be ſhewed by what Authority. Cro. El. 791. —— So if granted by A. B. Sacræ Theologiæ Profeſſor, Morgan and Williams, Moor 367. pl. 504. Cro. El. 431. —— Where granted by Archbiſhop, it need not be ſhewed there were Bona notabilia, Woodward and Thompſon. Cro. El. 907. —— Nor need be ſhewed, whether as Ordinary or by his Prerogative. Cro. El. 6. —— It is ſufficient to ſhew, that the King granted Adminiſtration without ſhewing his Power, for he hath univerſal Jurisdiction. An. 53. 1 Sid. 302.

(a) Tho' in a Declaration the Biſhop's Authority to grant Adminiſtration need not be ſhewed, yet it is otherwiſe in a Bar. Chard and Bird, Cro. El. 838. And for this Diverſity vide 1 Leon. 312. Lit. 79, 80. 1 Sid. 302. Style 106, 282. 1 Lev. 193. (b) Palm. 97, 98. S. C. adjudged, and a Diverſity taken where committed by one that hath a particular Juriſdiction within a certain Circuit, for there it ought to be ſpecially ſhewed, that he is Ordinary of that Place; but otherwiſe where committed by an Archdeacon who hath Epiſcopal Juriſdiction, and the Power of the Biſhop. Skidmore and Winſton, Cro. El. 879. 1 Sid. 228, 302. Style 54. 1 Salk. 38. 4 Mod. 133.

nario (a) is to commit Adminiſtration. *Mich.* 17 *Jac.* between (b) *Chiberton* and *Trudgeon*, *Cro. Jac.* 556.

(c) Maſon and Hampton S. P. 4 Mod. 133. 1 Show. 355. Comb. 196. (d) 6 Mod. 241. S. C. adjudged.

10. (c) If ſhewed that Adminiſtration was *debito modo* granted to the Plaintiff *per* A. B. *commiſſarium & officialem peculiaris Juriſdictionis de* B. it is well enough, without ſhewing he had Power to grant Adminiſtration, for every Peculiar hath an Ordinary, *&c. Trin.* 3 *Ann.* between (d) *Denham* and *Stephenſon*, *Salk.* 40. adjudged by three Judges againſt one, and that Judgment affirmed upon a Writ of Error in the Exchequer Chamber.

11. By the Statute of 16 & 17 *Car.* 2. *cap.* 8. after Verdict in any Action, *&c.* in the Courts at *Weſtminſter*, Counties Palatine of *Cheſter* and *Durham*, or Great Seſſions in *Wales*, Judgment ſhall not be ſtayed or reverſed for Want of a *Profert in Curia* of any Letters Teſtamentary or of Adminiſtration.

12. By 4 & 5 *Ann. cap.* 16. No Advantage or Exception ſhall be taken for the Default of alledging the bringing into Court of Letters Teſtamentary, or of Adminiſtration, but the Court ſhall give Judgment according to the Right, unleſs the ſame be particularly ſet down, and ſhewed for Cauſe of Demurrer.

Fol. 922.

(e) For what they may give in Evidence upon **Plene adminiſtravit** pleaded. Vide 2 Rol. Abr. 684, pl. 7, 8, 9, &c.

How the Executors (e) *ought to demean themſelves in Actions againſt them.*

(K) How they ought to plead Judgments firſt to be paid.

1. Co. 9. Meriel Treſham 109. b. **In Debt upon an Obligation the Executor confeſſes ſeveral Judgments and Recognizances to be paid, and that he hath Aſſets ſufficient to pay them, and after ſays that he had not** alia bona, **but what are not ſufficient to ſatisfy** prædictum debitum. **Reſolved this Plea is repugnant.**

(f) 2 Brownl. 118, 153.

2. **In Co. 9. aforeſaid reſolved,** (f) **if he had pleaded, that he had not any Goods** præterquam bona & catalla quæ non ſufficiunt ad ſatisfaciend. debitum prædictum, (g) **this is not good for the Uncertainty.**

(g) Not upon a Special, but is upon a General Demurrer. **Davis and Davis,** 1 Lev. 132. 1 Sid. 210. 1 Keb. 734. and vide Hob. 133.

(h) Sams and Mercer, Cro. Jac. 625. S. P. and vide Vaugh. 103.

3. (h) **But he ought to confeſs, that he hath Aſſets to ſatisfy** Debitum prædictum.

4. Or if the Truth be, that he hath not Aſſets to ſatisfy the Debts of Record, then he ought to confeſs what Goods he hath, ſcilicet, to the Value of a certain Sum, & non ultra, quæ non ſufficiunt ad debitum prædictum, &c.

5. (a) 9 E. 4. 12. In Debt the Executors plead a Judgment and Execution of 200 l. and another Judgment of 100 l. recovered of the Goods of the Teſtator againſt them, without that any of the Goods of the Teſtator were in their Hands the Day of the Writ purchaſed, or after, except to the Value of the ſaid 200 l. ſo levied; and the Court ruled it a good Plea; and if the Plaintiff will maintain his Action, he ought to ſay they have Aſſets beyond the 200 l. and 100 l.

(a) Fitz. Exec. 34. S. C. Br. Exec. 88. S. C.

6. (b) If an Executor hath not Aſſets beyond a Judgment, if he does not plead in an Action brought againſt him fully adminiſtred, he cannot give the Judgment in Evidence. 21 E. 4. 21. b.

(b) 2 Rol. Abr. 684. pl. 8. S. P.

7. (c) But in ſuch Caſe he ought to plead the Judgment ſpecially, and beyond this nothing in his Hands. 21 E. 4. 21. b.

(c) Kelw. 59. a. Style 378. Hob. 218.

8. In a *Scire facias* againſt an Adminiſtrator upon a Judgment againſt the Inteſtate, (d) he cannot plead *Nulla habet bona quæ fuer. inteſtati, &c. nec habuit die impetrationis, &c.* for a Judgment cannot be anſwered without another Judgment, and perhaps he hath adminiſtred all the Goods in paying Bonds, Debts by Statute, or Recognizances. *Paſch.* 39 *Eliz.* between (e) *Ordeway* and *Godfrey*, *Cro. El.* 575. adjudged upon Demurrer to the Plea, and held the Defendant ought to have pleaded ſpecially, how ſhe adminiſtred.

(d) Plene adminiſtravit ſuppoſes Goods come to his Hands, and therefore is no good Plea upon if Iſſue is 2 Keb. 736.

Demurrer thereto; for he ought to ſhew ſpecially how he adminiſtred, but is helped joined thereon. Harecourt and Wrenham, Moor 858. pl. 1178. 2 Brownl. 77. All. 48.

(e) All. 48. S. C. cited, and ſaid it did not appear, whether it was upon a general or ſpecial Demurrer. 4 Mod. 296. S. C. cited. —— And whether not Good upon a General Demurrer. Vide All. 48. Style 56, 57. Newton and Richards, Salk. 296. Comb. 298. 4 Mod. 296. Raym. 230. 2 Keb. 736. 3 Keb. 258.

9. Any Adminiſtrator (f) may plead a Recovery againſt him as Executor, and that he hath not Aſſets *ultra*. *Hill.* 40 *Eliz.* between *Smalpeace* and *Smalpeace*, *Cro. El.* 646. adjudged.

(f) So in Debt againſt two Executors, they may plead a Judgment againſt one of them as Adminiſtrator, for tho' he might have abated the Writ, yet being for a juſt Debt, he was not bound ſo to do. Parker and Amys, 1 Lev. 261. adjudged, 1 Sid. 404. adjudged, and Twiſden ſaid, that it had been held, that where an Executor was ſo ſued, that he might have abated the Writ, and did not, but ſuffered Judgment againſt him, it was a Devaſtavit, but that it was held otherwiſe at that Day; and vide Further and Further, 1 Sid. 334. and vide Comb. 221. Cro. El. 471.

10. If an Executor in pleading a Judgment, only ſhews how the Plaintiff had declared againſt him, *pro eo quod cum Teſtator per Scriptum ſuum, &c.* and that he thereupon confeſſed the Judgment; this (g) Plea is good, tho' not therein directly alledged, that the Teſtator was bound in the ſaid Bond. *Trin.* 11 *Will.* 3. between *Robinſon* and *Corbet*, 1 *Lutw.* 662. adjudged *per totam Curiam*; and ſaid by *Holt* and *Powel*, That none but the Party, his Heirs, Executors, *&c.* could plead *Non eſt factum*, and *Powel* ſaid, the Plaintiff could inſiſt on nothing but the Fraud, and that the Opinion in *Green* and *Wilcox*'s Caſe, *Cro. Eliz.* 462. had been long ſince exploded.

(g) Vide Brown and Purchaſe, 1 Sid. 230. 1 Keb. 808.

11. If an Executor pleads a Judgment in Bar of another Action, the Plaintiff may reply, that before the Action brought, Satisfaction was acknowledged on the Judgment. *Mich.* 41 *Eliz.* between *Hampton* and *Bartholomew*, *Cro. Eliz.* 728.

12. (i) If

12. (a) If an Executor ſuffers Judgment in Debt upon the ſimple Contract of his Teſtator, he may plead this in Bar of an *Aſſumpſit* brought againſt him; for tho' this Action of Debt was not maintainable againſt him, yet by the Death of the Teſtator the Debt was not loſt, but payable before Legacies, and an Action upon the Caſe lay for it. *Mich.* 18 *Car.* 2. between (b) *Palmer* and *Lawſon*, 1 *Sid.* 332, 333. adjudged.

(a) For this Point vide Further and Further, Cro. Eliz. 471. and Vaugh. 95, 100. 1 Vent. 199. Poſt Letter P.

For what Debt of the Teſtator the Executor is chargeable. 1 Brownl. 78. 2 Brownl. 185. (b) 1 Lev. 201. S. C. adjudged per totam Curiam, 2 Keb. 110, &c. S. C.

13. If an Executor pleads ſeveral Judgments *prout per ſeparalia recorda*, &c. without concluding to each *prout patet per recordum*, it is well enough; for it ſhall be taken *diſtributivè reddendo ſingula ſingulis*. *Paſch.* 19 *Car.* 2. between (c) *Palmer* and *Lawſon*, 1 *Sid.* 132, 133. adjudged.

(c) 1 Lev. 200. S. C. adjudged. — And for this vide Sams and Mercer, Cro. Jac. 626. and Cro. Jac. 8, 35, 182. Carth. 8. Lutw. 662.

14. If an Executor pleads a Judgment in Debt upon a ſimple Contract obtained againſt him, he need not aver, that it was for a true and juſt Debt. *Paſch.* 19 *Car.* 2. (d) *Palmer* and *Lawſon*, 1 *Sid.* 333. adjudged, and that it lies on the Plaintiff's Part to ſhew it was not ſo.

(d) 1 Lev. 200. S. C. — And for this vide Sams and Mercer, Cro. Jac. 626. and 1 Leon. 69. Cro. Jac. 100.

15. If an Executor pleads a Judgment againſt himſelf for Principal and Intereſt in his own Time incurred, he ought to ſhew ſpecially, that he had not Aſſets to pay the Intereſt, for otherwiſe it was a *Devaſtavit* to ſuffer that to run in arrear. *Mich.* 23 & 24 *Car.* 2. (e) between *Seaman* and the Adminiſtrator of *Everard*, 2 *Lev.* 39. adjudged.

(e) 1 Vent. 198. S. C. 2 Keb. 860, 879. 3 Keb. 15. S. C.

16. If an Executor pleads, that before the Action brought, *viz.* in *Hillary-Term*, (without ſhewing in what Year) *J. S.* recovered ſuch Debt againſt him, beyond which he hath no Aſſets; this is naught for Want of the Year. *Paſch.* 22 *Car.* 2. between (f) *Jordan* and *Foſſet*, 1 *Sid.* 449. adjudged upon a general Demurrer, being Matter of Subſtance.

(f) 1 Mod 50. S. C. adjudged, not being ſaid where entered or when obtained, ſo that the Plaintiff could ſay nothing but Nul tiel Record, whereas if the Judgment had been pleaded as it ought, he might have pleaded obtent' per fraudem. 1 Vent. 76. S. S. adjudged, 2 Keb. 633. S. C. adjudged.

17. If an Executor pleads a Statute, the Plaintiff may reply, that the Conuſee ſued an Extent and *Liberate* thereupon, and had Lands delivered, &c. for by Acceptance of the Land the Conuſee is concluded from having any Execution againſt the Goods of the Teſtator. *Hill.* 1 *Will.* & *Mar.* between (g) *Barker* and *Dye*, 3 *Lev.* 269. adjudged.

(g) 1 Lutw. 435, 436. S.P. — Where it may be ſpecially pleaded. Hob. 127. Winch 19, 20, 70. Noy 106. 2 Mod. 276. 1 Brownl. 52.

18. If an Action be brought againſt one as Executor, he may plead in Abatement that he is Adminiſtrator, &c. (h) but he cannot plead it in Bar. *Mich.* 5 *Will.* & *Mar.* between (i) *Harding* and *Salkil*, *Salk.* 296. *per Curiam*.

(h) Style 385. (i) Comb. 220, 221. S. C.

19. If a Judgment is obtained againſt an Executor by *Nil dicit*, and Writ of Inquiry awarded, but by the Death of the Plaintiff before the Return thereof it abates, and Adminiſtration is granted to the now Plaintiff, who according to the Statute of 8 & 9 *Will. cap.* 11. brings a *Scire facias* againſt the Defendant, to ſhew Cauſe why Damages ſhould not be aſſeſſed, and Judgment final given, and the Defendant as to aſſeſſing Damages ſays nothing, but ſays when aſſeſſed, the Plaintiff ought

not to recover them, for that a Judgment was obtained againſt him upon a Bond of his Teſtator, and that he hath not Aſſets *ultra*, &c. this Plea is naught, for the Statute never intended to give the Defendant leave to plead in Bar of the original Action. *Paſch.* 3 *Ann.* between (a) *Smith* and *Hannon*, 3 *Mod.* 142. adjudged.

(a) Salk. 315. S. C. adjudged upon Demurrer to the Plea, for the Statute intended only, that a Releaſe or other Matter happening Puis darrein continuance might be pleaded or Judgment arreſted, and the Executor cannot be hurt for Want of Pleading to the Action, for the Judgment is only de bonis teſtatoris, as if recovered againſt the Teſtator himſelf.

20. The beſt Way for an Adminiſtrator is to plead honeſtly, and if there be Judgment for a Penalty in Pleading thereof, he ought to ſhew how much is due thereon. *Trin.* 13 *Will.* between *Parker* and *Atfield*; *Salk.* 312. *per Curiam.*

21. If an Adminiſtrator pleads ſeveral Judgments, (b) and any one of them is ill pleaded or found fraudulent, the Plaintiff ſhall have Judgment. *Salk.* 312. *per Cur'.*

(b) Perhaps this may be intended where Iſſue is joined upon each of them ſeverally; but vide 2 Mod. 36. 4 Mod. 54. Carth. 196.

22. If an Adminiſtrator pleads ſeveral Judgments, & *riens ultra* 5 *s.* &c. it is a Confeſſion of Aſſets to ſatisfy all the Judgments, and the *Riens ultra* 5 *s.* is but Form, and not traverſable. *Salk.* 312. *per Curiam.*

(L) Which of them (c) may retain.

(c) And upon Plene adminiſtravit give it in Evidence. 2 Rol. Abr. 684. pl. 8. which vide with the Notes there.

1. A lawful Executor may retain the Goods of the Teſtator in Satisfaction of a Debt due to him from the Teſtator.

2. So it ſeems that an Adminiſtrator may retain to ſatisfy himſelf, becauſe he comes in by an Act in Law, ſcilicet, by the Letters of the Ordinary authorized by the Statute 31 Edw. 3. Mich. 14 Jac. B. between Sir William Warner and Wainford, adjudged Hill. 8 Jac. B. between Burnet and Dixe, admitted per Curiam, Hill. 11 Jac. B. between (d) Bond and Green per Curiam.

(d) Godb. 216, 217. S. C. adjudged.

3. If A. be indebted to B. and C. by ſeveral Obligations, and dies, and D. takes Adminiſtration, and after B. makes the ſaid D. his Executor, and dies, D. may retain the Goods that he hath as Adminiſtrator to A. to ſatisfy the Debt due to him as Executor of B. Hill. 8 Jac. B. between Burnet and Dixe per Curiam.

4. (e) An Executor of his own Wrong (f) cannot retain to ſatisfy himſelf, becauſe he comes to it by his own Act and Wrong, and not by any Courſe of Law; and if he might retain, thereof would enſue a great Inconvenience and Confuſion. (g) Co. 5. Coulter 30. b. reſolved.

(e) Alexander and Lamb S. P. 1 Brownl. 103, 104. per Curiam, Yelv. 137.

(f) Where in a Plea of Retainer he muſt intitle himſelf to the Executorſhip, notwithſtanding the Plaintiff hath declared againſt him as ſuch, for that the Plaintiff could not do otherwiſe. 1 Mod. 208. 2 Mod. 51.
(g) Ireland and Coulter, Cro. El. 600. S. C. adjudged, Moor 527. pl. 696. S. C. adjudged by all the Judges met at Serjeants Inn. Wentw. Off. Exec. 259. S. C.

5. It ſeems the Ordinary might before the Statute of 31 E. 3. retain to ſatisfy a Debt due to himſelf, becauſe he had the Power of Adminiſtration thrown upon him by the Law.

* Fol. 923.

6. But it ſeems, that after the Statute of 31 E. 3. that he could not retain, * becauſe now he ought of Right to grant Adminiſtration, and therefore the not granting, but adminiſtring himſelf, is in a Manner injurious, and therefore he cannot retain, and ſo take Advantage of his own Wrong.

(a) That ſuch Adminiſtratrix may retain, vide Roskelly and Godolphin, Ray. 483, 484. Skin. 214, 215.

7. If an (a) Adminiſtratrix durante minoritate of an Executor makes ſeveral Bonds to the Creditors of the Teſtator, and after marries, the Husband may retain ſo much of the Goods of the Teſtator, which amount to the Value of the Debts ſecured by the Obligations of his Wife, as his own Goods. Hobart's Reports Caſe 327. between (b) Briers and Goddard, per Curiam.

(b) Hob. fol. 250. S. C.

8. Quære, If the Wife dies, whether the Husband may detain after, for then the Husband is no longer chargeable by the Obligations. (c) Hobart's Reports, Caſe 327. It ſeems that if in the Life of the Wife, he declares that he retains ſuch particular Goods in Lieu of the Obligations, tho' the Wife after dies, yet by the Declaration the Property was abſolutely altered in the Husband, and then the Death of the Wife after will not deveſt it.

(c) Hob. fol. 250. S. P.

9. If there be two Executors, and one pays the Debts of the Teſtator with his own Money, (d) he may retain ſo much of the Goods of the Teſtator againſt his Companion. 37 H. 6. 30. 20 H. 7. 5. b.

(d) 2 Rol. Abr. 684.

10. So if the Teſtator was indebted to one Executor, he may retain to ſatisfy himſelf againſt his Companion. 37 H. 6. 30. contra (e) 20 H. 7. 5.

(e) Kelw. 63. a.

(f) 1 Vent. 199. S. P.

11. (f) An Executor may retain a Debt due to himſelf by the Teſtator upon a Contract, for tho' no Action of Debt lies againſt an Executor upon a Contract, yet it is a Duty, (g) and if he pleads thereto, and takes no Advantage thereof, it ſhall bind him; and alſo an Action upon the Caſe lies upon ſuch Contract againſt an Executor. Mich. 1649. between Sleddal and Bowerbank, adjudged per Curiam upon a Demurrer. Intratur Trin. 1649. Rot. 948.

(g) Fiſher and Snelling, Yelv. 55. Cro. Jac. 47. But for this vide ante P. 14. and the Notes there, and 2 Rol. Abr. 716. pl. 2.

12. If an Action be brought upon a Contract againſt J. S. as Executor to B. (where he is Executor of his own Wrong) and pending the Suit upon Continuances, Adminiſtration of the Goods of B. is granted to J. S. he may retain in this Caſe Goods to ſatisfy an Obligation in which B. was bound to him, becauſe Debts on Specialty ought firſt to be ſatisfied, and (h) now he is made lawful Adminiſtrator, and cannot ſue himſelf. Trin. 1652. between (i) Williamſon and Norwich, adjudged upon Demurrer. Intratur Hill. 1651. Rot. 1667.

(h) Baker and Berisford, 1 Sid. 76. 1 Keb. 285. 2 Lev. 154.

(i) Style 337, 338. S. C. adjudged, and vide Style 384.

13. If after a Verdict for the Plaintiff the Defendant dies before the Day in Bank, and Judgment is entered the next Term, according to the Statute; in a *Scire facias* upon this Judgment againſt the Executor of the Defendant, he cannot plead a Retainer for Money to him due from the Teſtator on Bond. *Mich.* 21 *Car.* 2. between (k) *Burnet* and *Holden*, 1 *Lev.* 277. adjudged by two Judges againſt one.

(k) Raym. 210. S. C. adjudged, 1 Mod. 6. S. C. 2 Keb. 549, &c. S. C.

14. If an Executor waſte the Eſtate of his Teſtator, ſo that an Action lies againſt his Executor by Statute 30 *Car.* 2. if the firſt Executor was indebted by ſimple Contract to the Second, he may retain for his

Debt againſt the Debt grounded upon the *Devaſtavit*, (a) for that ſhall not be accounted a Debt ſuperior to a ſimple Contract. *Mich.* 2 *Jac.* 2. *Bathurſt*'s Caſe, 2 *Vent.* 40.

(a) 1 Saund. 218.

15. If an Action be brought againſt a Special Adminiſtrator, and the Adminiſtration determines pending the Action, he ought to retain Aſſets to ſatisfy the Debt which is attached on him by the Action. *Hill.* 10 *Will.* between *Sparks* and *Crofts*, *Comb.* 465. adjudged.

Executor, Adminiſtrator.

(M) (b) In what Caſes they may retain.

(b) Wentw. Off. of Exec. 46.

1. If the Teſtator gives a gold Cup in Pawn for 20 l. and the Executor out of his own Money redeems the Pledge, he may retain the Pledge as his proper Goods. (c) 20 H. 7. 2. b. 4, 5.

(c) Br. Adminiſtrators 51. S. C.

Kelw. 58, 61, 62. S. C. 2 Rol. Abr. 684. pl. 7. S. C. which vide with the Notes there. Wentw. Off. of Exec. 109, &c.

2. (d) If (e) Executors pay Debts of the Teſtator out of their own proper Goods, they may retain ſo much in Value of the Goods of the Teſtator as their proper Goods. (f) 20 H. 7. 2. b. 5.

(d) Baker and Berisford L. P. 1 Sid. 76.

1 Keb. 285. 1 Lev. 154. and vide Dy. 2. a. 1 And. 24. (e) But if the Teſtator orders that his Executors ſhall ſell his Lands for Payment of his Debts, and they pay the Debts with their own Money, they attain no Intereſt in the Lands. Kelw. 58. b. Dy. 2. a. (f) Kelw. 58, 59, 61, 62. S. C. 2 Rol. Abr. 684. pl. 11. S. C. which vide with the Notes there, and 1 Leon. 111. S. C. cited.

3. If one be indebted to a Teſtator, and the Executors have no Goods in their Hands, (g) and they bring Debt againſt the Debtor, and recover, where the Coſts amount to the Value of the Debt recovered, in this Caſe they ſhall retain as their own Goods. 20 H. 7. 4. b.

(g) In the Original it is per quæ.

4. If a Creditor be made Executor by his Debtor, and pays himſelf Part out of the Goods, (h) he cannot ſue the Heir for the Reſt, becauſe the Debt cannot be apportioned. *Wentw. Off. of Exec.* 133.

(h) Pl. Com. 185. b.

5. If an Executor takes up his Teſtator's Bond, and gives his own Bond for Payment of the Money at a Day to come, this is a good Adminiſtration, ſo that the Property of Goods of the Teſtator to the Value (i) is altered, and changed in the Defendant. *Mich.* 30 & 31 *Eliz.* between (k) *Stamp* and *Hutchins*, *Cro. Eliz.* 120. adjudged.

(i) For this vide Wentw. Off. of Exec. 46. Hob. 10.

(k) Moor 260. pl. 409. S. C. adjudged he may retain as much as if he had paid his own Money. 1 Leon. 111. S. C. adjudged, Goulſ. 79. S. C. adjornatur.

6. If one hath a Term for Years as Adminiſtrator, and with his own Money pays Debts of the Inteſtate to the Value thereof, (l) he may retain and hold the Term in Satisfaction thereof. *Hill.* 16 & 17 *Car.* 2. between (m) *Baker* and *Berisford*, 1 *Lev.* 154. adjudged in an Action of Debt by the Adminiſtrator of *A.* brought for Rent upon an Under-leaſe made by *A.*

(l) Cleydon and Spenſer S. P. Moor 2. pl. 3. N. Bendl. 1. pl. 8. and vide 1 And. 24.

(m) 1 Sid. 76. S. C. 1 Keb. 285. S. C.

(N) The

(N) The (a) Power of an Executor.

(a) As to his Privilege or Power of preferring one Creditor before another, vide poſt under Letter Q. throughout.

1. (b) **A Woman Executrix cannot give the Goods of the Teſtator** in pios uſus **without the Aſſent of her Husband.** 18 H. 6. 4.

(b) Wentw. Off. of Exec. 291. S. P.

Fol. 924.

2. **A Woman cannot make an Acquittance or Releaſe** (c) **without her Husband.** (d) 27 E. 3. 82. b. **admitted by the Iſſue.** Contra 8 H. 6. 4. b.

(c) She can do nothing to the Prejudice of her Husband. 5 Co. 27. b. but for this Wentw. Off. of Exec. 291, 293, 297. 1 And. 117. —— But the Husband without his Wife, at his Pleaſure, may diſpoſe of the Goods of the Teſtator, or releaſe, &c. Wentw. 297. Kelw. 122. a. b. (d) Q. if not miſprinted in the Original, for I find no ſuch Iſſue in the Book.

3. An Executrix alone without her Husband cannot, without a real Satisfaction, acknowledge Satisfaction upon a Judgment obtained by her Teſtator. *Hill.* 12 & 13 *Car.* 2. between *Dame Fenner* and Sir *Lewis Dives*, 1 *Sid.* 31. *per Curiam.*

4. If Leſſee for Years by certain Rent dies, and leaves Aſſets ſufficient to pay the Rent, and all other Debts, his Executor cannot (e) waive the Leaſe, but ſhall be tied to anſwer the Rent, tho' much more than the Land is worth. *Wentw. Off. of Exec.* 172.

(e) That he cannot waive the Term after he hath aſſented to the Executorſhip. Moule and Mody, Palm. 116, 117. Cro. Jac. 549. 2 Rol. Rep. 131. Helyar and Casbord, 1 Sid. 266. 1 Lev. 127. and vide Palm. 150. Latch 261. Style 61. 1 Vent. 271. 2 Vent. 209. Salk. 297.

5. And if there be Aſſets ſufficient to bear the Loſs for ſome Years, but not during the whole Term, the Author thinks the Executor muſt pay the Rent ſo long as theſe Aſſets will hold out, and (f) then waive the Poſſeſſion, giving Notice to the Reverſioner, and that he may do this notwithſtanding his Occupation for ſeveral Years after the Death of the Teſtator, becauſe not voluntary, but as of Neceſſity; but leaves this as a *Quære* to be adviſed of by good Counſel. *Wentw. Off. of Exec.* 172.

(f) Where he may plead that he hath no Aſſets, and that the Lands are of leſs Value than the Rent, and pray Judgment whether he ought not to be charged in the Detinet only. Pollexf. 125. Salk. 297, 317. And vide my ſecond Part 504. pl. 10. and the Notes there.

(O) The Power of Executors, &c. between themſelves.

(g) Wentw. Off. of Exec. 141, 142, 151. and vide Goulſ. 141. Kelw. 23. a.

1. **If two have a Leaſe for Years as Executors, and** (g) **one ſells the Whole, this ſhall bind the other, and the Whole ſhall paſs,** (h) **for each had the intire Power of Diſpoſing of the Whole, both being poſſeſſed in the Right of their Teſtator.** 37 El. B. R. **between** (i) Pannel **and** Fenn, **agreed and adjudged.**

(h) And therefore if one Executor grants to the other, 'tis void, for that he had the Whole before. 3 Leon. 209. Wentw. Off. of Exec. 141, 321. —— And one Executor ſhall not have an Account againſt his Companion. Noy 78.
(i) Goulſ. 185. S. C. adjudged, Moor 350. pl. 470. S. C. My ſecond Part 535. pl. 3. S. C. and vide Wentw. 141, 142.

2. Rot. Parliamenti 43 E. 3. numero 22. **the Commons prayed, that where a Man made many Executors, and dies, (a) and one of the Executors refused the Administration, that Acquittances made by him who refused the Administration should not be prejudicial to him who accepted the Administration, but that such Acquittances should be void.**

(a) That he continues Executor notwithstanding, vide Wentw. Off. of Exec. 60.

Dyer 160. pl. 42. 9 Co. 37. a. Salk. 3, 311. Far. 39.

Answer.

3. **Let the Law before these Days on this Point used, be held and kept.**

4. If two Executors have a Bond made to their Testator, and one of them by Words only gives and delivers this Bond to his own Creditor in Satisfaction of his own Debt, and dies; tho' the Debt by the Bond did not pass, yet because the deceased Executor (b) might have (c) released the Debt, he had Power to dispose of the Instrument by which the Debt became due. *Mich.* 37 & 38 *Eliz.* (d) between *Kelsock* and *Nicholson*, *Cro. Eliz.* 478, 496. adjudged by two Judges against one, in *Detinue* brought by the surviving Executor for the Bond.

(b) Dal. 53. Cro. El. 496. 3 Leon. 209. Noy 36. Goulf. 141.

(c) **If one Executor releases his Part of the Debt, it discharges the Whole.** Wentw. Off. of Exec. 141. pl. 589. S. C. **adjudged,** Noy 36. S. C. 2 Rol. Abr. 46. G. 3. S. C.

(d) Moor 422.

Executors.

(P) For what (e) (f) Debt of the Testator the Executor may be charged.

(e) Where an Executor is chargeable upon the collateral Promise of the Testator. My first Part 38. pl. 2, 3, &c. and vide

1. **AN Action of Debt lies against an Executor for the Arrears of an Account made by the Executor himself of Receipts by the Testator.** (g) 2 H. 4. 13. b.

Ow. 56. Goulf. 154. Cro. Jac. 571. 1 Rol. Rep. 301.

(f) That an Executor may be sued for such Debt by **quo minus.**

(g) Fitz. Executors 49. S. C. Br. Executor 40. S. C.

2. **So it lies upon the Arrears of an Account found before Auditors.** (h) 11 H. 4. 64. dubitatur, **it seems to be intended of Auditors assigned of Record, and so is** 11 H. 4. 92. **for that the Testator could not wage his Law.** 4 H. 6. 18. 10 H. 6. 25. (i) 11 H. 6. 48. **But if the Testator was found in arrear upon an Account before Auditors, who were not Auditors within the Statute of** Westm. 2. **but Auditors at Common Law, the Executors shall not be charged, for that they are not Auditors of Record.** (k) 10 H. 6. 25.

S. C.

(h) Br. Executors 58. S.C. 121. S.C. Br. Debt 67. S. C.

(i) Br. Executors 163. S. C. Br. Debt 188.

(k) Br. Debt 183. S. C. Fitz. Executors 21. S. C.

3. **The Executor is not chargeable for a Debt due by the Testator upon a simple Contract.** (l) 10 H. 6. 25.

(l) Fitz. Executors 21. S.C.

4. **Regularly an Executor shall not be charged without** (m) **Specialty in any Action in which the Testator might have waged his Law.** Co. 9. Pinchon 88. **for that the Executor cannot wage his**

(m) Not on a Tally. Vaugh. 100.

(a) Br. Adminiſtrators 13. S. C. Fitz. Adminiſtrators 17. S. C.

Law of another's Contract. (a) 46 E. 3. 10. b. 11 (b) H. 6. 48. b. Mich. 37, 38 El. B. R. agreed and adjudged between Germain and Rowles.

(b) Br. Executors 163. S. C. Br. Debt 188. S. C.

By what Action.

(c) Cro. Jac. 293. S. C. 2 Brownl. 137. S.C. adjudged. My firſt Part 38. pl. 1. which vide with the Notes there.

5. Co. 9. (c) Pinchon 87. By all the Juſtices and Barons, That where the Teſtator upon a Bond of 200 l. to him, promiſes to pay it on Demand, the Executor may be charged in an Action upon the Caſe upon the Aſſumpſit, becauſe the Teſtator could not have waged his Law in this Action, and this Action, altho' it be mix'd with a Treſpaſs, as the Action ſays, yet non moritur cum perſona Com. Norwood Rede 101. 15 H. 4. and this agrees with Co. 9. Pinchon 87. Debt does not lie againſt an Executor for the Meat and Drink of the Teſtator, for that the Teſtator in this Action might have waged his Law.

(d) Fitz. Executors 4. S. C.

6. (d) 4 H. 6. 19. b. Co. 9. 87. b. The ſame Law of a Limner for his Wages. 4 H. 6. 19. b.

7. Co. 9. 88. A Labourer within the Statute ſhall charge an Executor, for that the Teſtator could not have waged his Law.

(e) Fitz. Executors 50. S.C. Br. Debt 53. S. C. Moor 698. pl. 971. 2 Inſt. 382. (f) Fitz. Executors 4. S. C. (g) Br. Executors 163. S. C. Br. Debt 188. S. C.

(e) 2 H. 4. 14. b. (f) 4 H. 6. 19. b. (g) 11 H. 6. 48. b.

Fol. 925.

8. If A. makes B. his Attorney General to retain Servants, and he retains one, and after A. makes B. his Executor and dies, the Servant ſhall not have Debt againſt the Executor for Wages incurred in the Life of the Teſtator, for that the Teſtator might have waged his Law if the Action had been brought againſt him notwithſtanding the Deed. (h) 46 E. 3. 10. (R. Quære this, for that as to the Teſtator it was a Contract made by other Hands.)

(h) Br. Adminiſtrators 10. S. C. Fitz. Adminiſtrators 17. S. C.

9. If the Teſtator makes a Contract, and dies, and his Executor by his Deed acknowledges the Contract, an Action of Debt lies againſt him for it, altho' the Teſtator might have waged his Law in the Action, for he might have denied the Contract, of which Plea the Executor is ouſted by the Deed. (i) 46 E. 3. 11. adjudged, 11 H. 6. 48. b. without Deed.

(i) Br. Adminiſtrators 13. S. C. Fitz. Adminiſtrators 17. S. C.

10. If a Servant be retained for a certain Sum to ſerve in the War, if the Maſter dies, Debt does not lie againſt his Executors for his Salary without Deed. (k) 2 H. 4. 14. b.

(k) Fitz. Executors 50. S.C. Br. Debt 53. S. C. and vide Moor 698. pl. 971.

11. An Action of Debt lies againſt an Executor for Arrears of Rent incurred in the Life of the Leſſee, reſerved on a Leaſe for Life or Years. 46 E. 3. 10. without Deed. 11 H. 4. 64. b.

12. In an Action of Debt againſt an Executor for Fees and Charges by him expended as Solicitor of the Teſtator in a Suit againſt the Teſtator, if the Executor pleads Ne unque Executor, nor ever adminiſtred as Executor, and after Judgment is given againſt him; yet he may reverſe it in a Writ of Error, for it appears

pears to the Court, that the Action does not lie against an Executor, and the Plea aforesaid does not acknowledge the Contract. Mich. 37, 38 Eliz. B. R. between (a) Germain and Rowles, adjudged in a Writ of Error.

(a) Cro. El. 425, 459. S.C. adjudged, tho' the Action as there laid, lay for Part. Moor 366. pl. 500. S. C. adjudged, and Norwood's Case in the Commentaries denied. 2 Rol. Abr. 107. pl. 6. S. C.

13. Debt for Relief lies (b) by the Executor of the Lord against the Executor of the Tenant, for in the Creation of the Tenure there was a Contract between *Saint John* and *Baudrip*, *Noy* 44. adjudged.

(b) Not by the Lord, for he can have no Action for it, but only distrain. Co. Lit. 85.

14. If Debt upon a simple Contract be brought against Administratrix, and she pleads fully administred, which is found against her, yet the Plaintiff shall not have Judgment; for tho' the Plea admits the Action, yet thereby the Authority of the Court is not taken away, which (c) *ex Officio* ought to abate the Writ without Exception of the Party. *Pasch.* 30 *Eliz.* between (d) *Hughson* and *Web*, *Cro. Eliz.* 121. adjudged by all the Judges.

(c) But vide Fisher and Richardson, Cro. Jac. 47. Yelv. 55, 56.

Vaugh. 95, 100. 1 Sid. 333. 1 Lev. 200, 201. (d) 1 Leon. 165. S. C. Goulf. 106, 107. S. C. adjudged, 1 And. 182, 183. seems to be S. C. adjudged, Cro. El. 426. S. C. cited.

15. An Action of Debt lies not against an Executor upon an Award made in the Life of his Testator, (e) because the Testator might have waged his Law. *Pasch.* 39 *Eliz.* between *Hampton* and *Boyer*, *Cro. Eliz.* 557, 600. adjudged upon Demurrer.

(e) For this vide 2 Rol. Abr. 107. c. 3.

16. If *A.* covenants with *B.* to put his Son Apprentice to *C.* or otherwise, that the Executors of *A.* shall pay *B.* 20*l.* and *A.* does not put his Son Apprentice to *C.* but dies, *B.* shall not have Debt against the Executors of *A.* for it cannot be a Debt in the Executor where it was none in the Testator. *Pasch.* 33 *El.* between *Perrot* and *Austin*, *Cro. Eliz.* 232. adjudged.

17. If 40*l.* is bequeathed to an Infant, and the Executor delivers the Money to *J. S.* who seals a Bill testifying the Receipt of the 40*l.* to the Use of the Infant, and dies, and the Infant after dies Intestate, his Administrator may have Debt or Account at his Election against the Executors of *J. S.* *Hill.* 42 *Eliz.* between (f) *Shaw* and *Norwood*, *Moor* 667. *pl.* 914. adjudged, and ruled, that the Specialty, tho' not made to the Infant himself, was a sufficient Testimony of the Debt upon which the Executor was chargeable.

(f) 1 Brownl. 82. S. C. adjudged, Yelv. 24. S.C. adjudged, Ow. 127. S.C.

18. If *A.* is indebted to *B.* by simple Contract, and *B.* becomes a Bankrupt, and this Debt is assigned, and *A.* dies, yet Debt will not lie for it against his Executors. *Pasch.* 6 *Car.* between (g) *Morgan* and *Green*, *Cro. Car.* 187. adjudged upon Demurrer, tho' objected it was in Nature of a Debt upon Record, and the Plaintiffs by Act of Parliament enabled to sue for it.

(g) 1 Jon. 223. S. C. adjudged, and that they might have Case, but not Debt.

(Q) What

(Q) What Debts (a) ought to be firſt ſatisfied.

(a) Where a Teſtator is very much indebted, and the Executor deſirous to be rid of the Aſſets, it is ſafe for the Executor to file a Bill in Chancery againſt all the Creditors, to the End they may, if they will, conteſt each others Debts, and diſpute who ought to be preferred in Payment. 2 Vern. 37.

1. If the Teſtator had acknowledged a Statute for the Performance of Covenants in certain Indentures, yet the Executor cannot plead it in Bar of an Action of Debt upon an Obligation, (b) the Statute not being forfeited at the Time, becauſe it is uncertain whether it ſhall ever be forfeited. 5 Co. (c) Harriſon 28. b. adjudged, contra Paſch. 38 El. B. R. between (d) Woodcock and Foxe adjudged.

(b) For this vide Moor 752. pl. 1034. 1 Bulſt. 22,101. Cro. El. 467. Ow. 72. Cro. Jac. 9. 35.

(c) Bridg. 80. S. C. cited, 1 Rol. Rep. 405. S. C. cited and agreed.

(d) Goulſ. 142. S. C.

2. If the Teſtator had acknowledged a Recognizance with Condition for Payment of a leſs Sum at a Day to come, the Executor may plead this Recognizance in Bar of an Action of Debt upon an Obligation, tho' the Day of Payment by the Condition of the Recognizance be not yet come; becauſe this is a Duty preſently, and certain in as much as the Condition is for the Payment of Money. Trin. 14 Jac. B. R. between (e) Robſon and Francis agreed.

(e) Bridg. 79, 80. S. C. and S. P. ſeems to be agreed. 1 Rol. Rep. 405. S. C.

3. But if the Condition of the Recognizance be for Payment of 100 l. to an Infant when he comes to his full Age, this Recognizance during the Infancy is not any Bar of a Debt upon an Obligation; becauſe it is uncertain whether any Thing will be ever due upon the Recognizance, for the Infant may die before his full Age, and then nothing ſhall be paid. Trin. 14 Jac. B. R. between (f) Robſon and Francis, dubitatur.

(f) Bridg. 79, 80. S. C. and two Judges againſt one for the Plaintiff. 1 Rol. Rep. 405. S. C. adjornatur.

4. If the Teſtator acknowledges a Recognizance in Nature of a Statute Staple, of which the Defeaſance is, that whereas the Conuſee and Teſtator were bound in an Obligation to B. a Stranger for the Debt of the Teſtator, and as his Surety with Condition for Payment of 100 l. at a Day yet to come, it is granted by the ſaid Defeaſance, that if the Teſtator, his Executors or Aſſigns pay the 100 l. to B. at the Day, then the Statute ſhall be void; and tho' this be a collateral Sum to be paid to a Stranger to the Statute, and not to the Conuſee, and ſo no Duty to the Conuſee, and perhaps the Heir of the Teſtator will pay the Money * at the Day; yet in as much as it is for the Payment of Money certain, for which by Intendment the Executor will be charged, the Executor may plead this Statute in Bar of an Action of Debt upon an Obligation before the Day of Payment comes. Paſch. 10 Car. B. R. between (g) Goldſmith and Sidnar per Curiam, but Judgment was given for the Plaintiff for a Fault in the Plea in Bar. Intratur Mich. 9 Car. Rot. 432.

* Fol. 926.

(g) Cro. Car. 362. S. C. and S. P. agreed, tho' Judgment was given for the Plaintiff, for a Fault in the Plea. —— A Recognizance in Chancery muſt be paid before a Debt on Bond. Vaugh. 103.

5. Where there are two Debts on Specialties, and of one the Day of Payment is paſt, and of the other the Day of Payment is not come, he cannot pay this Debt of which the Day of Payment is not come before the other. Dr. and Student 77. b. 9 E. 4. 13.

6. (a) If there are ſeveral Debts due to ſeveral Perſons by Obligations or by Contracts, and for one of the Debts (b) an Action is brought, the Executor, Adminiſtrator or Ordinary cannot pay the other Debt for which no Action is brought. Dr. and Student 77. D. 28, 29 H. 8. 32. pl. 2. D. 6, 7 El. 232. pl. 5. (c) 48 E. 3. 21. b. Kelleway 21 H. 7. 74. per Frowick.

(a) Cro. Jac. 9. S. P.
(b) By Original, not by Latitat out of the King's Bench. 2 Vern. 300.
(c) Fitz. Adminiſtrator 18. S. C. Br. Adminiſtrator 14. S. C.

7. So if an Action brought againſt an Executor abates by a Plea, that he is Adminiſtrator and not Executor, and after another Writ is brought againſt him as Adminiſtrator (d) by Journeys Accounts, he cannot after pay other Debts between the two Actions brought before this Debt, for he ought to plead fully adminiſtred the Day of the firſt Writ brought. (e) 48 E. 3. 21. b.

(d) For this vide Spencer's Caſe, 6 Co. 10.
(e) Fitz. Adminiſtrator 18. S. C. Poſt Letter T. pl. 3. S. C. which vide with the Notes there.

8. If there are two Actions brought againſt an Executor, one by A. and the other by B. the Executor (f) may pay that Debt of which he had firſt Notice of the Action brought, tho' this Writ was laſt purchaſed.

(f) I ſuppoſe this muſt be intended before he hath Notice of the other. Moor 678. pl. 926. 173. pl. 306. 1 Leon. 312. 2 Leon. 60.

9. If there be ſeveral Actions brought againſt Executors, &c. of equal Nature, the Executor cannot pay any of them before the other, pending the Actions.

10. (g) If there be ſeveral Actions brought againſt an Executor, &c. of equal Nature, the Executor may confeſs Judgment to any of them, who hath an Action depending, tho' his Action was brought after the others. Dr. and Student 77. b. Kelloway 21 H. 7. 74. per Curiam, 9 E. 4. 13.

(g) Moor 678. pl. 926. S. P. Cart. 228. S. P. 1 Sid. 21. Kelw. 74. b. Moor 173. pl. 306.

1 Leon. 69. 2 Vern. 300. 1 Jon. 91, 92. —— And the Plaintiff cannot reply that the laſt Action was brought by Fraud, &c. without traverſing that it was for a juſt Debt. Wilcox and Green, Moor 705. pl. 984. Cro. Eliz. 662. 1 Brownl. 50. Lutw. 662. by Powel, the Plaintiff muſt inſiſt on the Fraud, and the Caſe of Wilcox had been exploded. But where an Executor's Time for Pleading was out, the Court would not enlarge his Time for Pleading, unleſs he would enter into a Rule not to plead any Judgment obtained againſt him after his Time was out. Mod. Caſ. 308. vide 1 Bulſt. 122, 123.

11. (h) Executors at their Peril ought to take (i) Notice of Debts upon Record, and pay them firſt; and tho' a Recovery be in another County than where the Teſtator and Executors inhabited, it is not material. *Mich.* 42 & 43 *Eliz.* between *Littleton* and *Hibbens*, *Cro. Eliz.* 793. adjudged.

(h) 2 And. 157, 158. 3 Mod. 115.
(i) But where Executors ſhall be excuſed for Want of Notice, vide Kelw. 51. a. Moor 37. pl. 122.

12. Debts by Bond ſhall be paid before Debts by ſimple Contract. 9 *Co.* 88. *b.*

13. So if the Condition of a Bond be to pay Money at a Day not yet come, it ought to be paid before a Debt by ſimple Contract. *Trin.* 33 *Car.* 2. between *Leman* and *Fooke*, 3 *Lev.* 57. adjudged.

14. Executors may pay Statutes or Bonds in which they were jointly and ſeverally bound with their Teſtator. *Mich.* 25 *Car.* 2. between *Rogers* and *Danvers*, 1 *Mod.* 165. *per Curiam*, and ſaid it was common for Exe-

(k) Cro. El. 315.

cutors, upon *Plene adminiſtravit* pleaded, to give in Evidence Payment of ſuch Bonds, and that ſometimes ſuch Perſons were made Executors for their Security.

15. (a) An Executor may pay a Debt upon ſimple Contract before a Bond of which he had no Notice. *Trin.* 2 *Jac.* 2. between (b) *Horman* and *Harman*, 3 *Mod.* 115. agreed *per Curiam*, but ſaid no Judgment was given.

(a) 2 And. 159. 1 Mod. 175. Vaugh. 94. 3 Lev. 115. 1 Sid. 230. Fitzg. 78. and vide Cro. Jac. 535. 2 Vent. 360.

(b) Comb. 35. S. C. and ſaid Judgment was given for the Plaintiff.

16. Executor ſued for Rent due in the Life of the Teſtator, on a Parol Leaſe, cannot thereto (c) plead a Bond entered into by the Teſtator, and that he hath not Aſſets *ultra*, &c. *Paſch.* 2 *Will.* & *Mar.* between (d) *Newport* and *Godfrey*, 3 *Lev.* 267. adjudged, and that Judgment after affirmed upon a Writ of Error in the Exchequer Chamber, and by *Holt* Chief Juſt. and all the Court, the Contract remained in the Realty notwithſtanding the Term was determined.

(c) But on ſuch Bond to himſelf he might have retained. Salk. 326. — A Debt by Specialty is equal, but not ſuperior to a Debt for Rent. Salk. 326. Wentw. Off. of Exec. 209. Poſt Letter G. pl. 3. vide, and the Notes there. (d) 4 Mod. 44. S. C. adjudged, 2 Vent. 184. it appearing by the Report in both theſe Books, that the Leaſe was determined in the Life of the Teſtator. Comb. 183. S. C. adjudged.

17. If an Executor pleads ſeveral Judgments, and the Plaintiff confeſſes the Plea to be true, and prays Judgment of Aſſets *in futuro*; if Aſſets after come to the Hands of the Executor, he may ſatisfy the Judgments pleaded, for the Judgment of Aſſets *de futuro* is only to be paid after the other Judgments. *Trin.* 13 *Will.* between *Parker* and *Atfield*, *Salk.* 312. *per Curiam.*

(R) Judgments (e) in the Life of the Teſtator.

(e) Where after a Verdict for the Plaintiff at the Niſi prius, the Defendant dies before the Day in Bank, and according to the Statute of 17 Car. 2. cap. 8. Judgment is entered againſt him, this ought to be paid as a Judgment in the Life of the Teſtator.

1. IF a Man acknowledges a Statute to one, and after another recovers a Debt againſt him, and after he dies, (f) the Executor ought to ſatisfy this Judgment before the Statute, (g) becauſe it is more worthy, for in a (h) Scire facias againſt him upon the Judgment, it is no Plea for the Executor to plead the Statute acknowledged by the Teſtator before the Judgment. Mich. 32, 33 El. B. R. between (i) Bond and Bayly adjudged, and there it is ſaid, that Paſch. 32 El. B. between (k) Conny and Baron adjudged.

Bunet and Holden, Raym. 210. 1 Levin. 277. 1 Mod. 6. 6 Mod. 144. —— But as to a Judgment given by Force of 8 & 9 Will. 3. againſt an Executor whoſe Teſtator died after an interlocutory Judgment againſt him, vide Smith and Hannan, 6 Mod. 142. Salk. 315. and vide Salk. 42. (f) But yet if the Goods of the Teſtator are taken in Execution upon the Statute, this being without the Conſent of the Executor, and no Act or Folly in him; in a Scire facias brought upon this Judgment he may plead it. 2 And. 157, 158. where paid by Executor pending a Writ of Error upon the Judgment. Rede and Beerlock, Yelv. 29. Cro. El. 734, 822. 2 Brownl. 30, 81, 82. But vide Wentw. Off. of Exec. 196. 4 Mod. 248. 6 Mod. 144. (g) 4 Rep. 60 a. 5 Co. 28. b. (h) Whether in Debt brought upon the Judgment it be a good Plea. 1 Brownl. 101. Gomerſal and Ash, dubitatur. Yelv. 133. N. Dyer 80. a. (i) 1 Leon. 328. S. C. adjudged, 3 Leon. 270. S. C. adjudged. (k) 1 Leon. 329. S. C. cited, 3 Leon. 271. S. C. cited.

2. If a Man recovers a Debt againſt B. and after B. acknowledges a Statute to C. and after makes his Executor, and dies, the Executor ought firſt to ſatisfy the Judgment, and not the Statute which became due after the Death of the Teſtator, for the

Judgment is more high. Dubitatur Hill. 42 El. B. R. **between** (a) Beerbrook **and** Read. (a) Cro. El. 734, 822. S. C.

Yelv. 29. S. C. 2 Brownl. 39, 81, 82. S. C. 2 And. 157, 158. S. C. 4 Co. 60. S. C. cited, 5 Co. 28. b. S. C. cited, and **vide** Wentw. Off. of Exec. 196.

3. **If A. recovers against B. and after C. recovers against him, and after B. dies, his Executor may satisfy which of the Judgments he pleases,** scilicet, **the later Judgment if he will, for they are all one as to him.** Trin. 12 Jac. **by** Nicholls.

4. There is no Precedency between one Judgment and another (b) had against the Testator, and Priority of Time is not material, (c) but he which first sues Execution must be preferred; tho' before Execution sued the Executor may pay which he will first; yet if each brings a *Scire facias*, the Executor (d) may confess the Action of which he will first, tho' one *Scire facias* was brought before the other. *Wentw. Off. of Exec.* 197.

(b) **But if there be two Judgments given against an Executor, that Judgment which was first given shall be first executed.** 1 Leon. 329. 3 Leon. 270.

(c) 1 Leon. 329. 3 Leon. 270.

(d) Ante **Letter** Q. 10.

(S) What Debt ought first to be satisfied by them, and what not, (e) without a *Devastavit*.

(e) 1 Sid. 404. **Twisden** said it had been held, that where an Executor was so sued, that Fol. 927. he might have

Judgments in the Life of the Testator.

1. **SO much of the Goods of the Testator, that are** (f) **sufficient for his Funeral may be imployed to such Use before Debts or Legacies paid.** 37 H. 6. 30. 28.

abated the Writ, and did not, but suffered Judgment, it was a **Devastavit**, tho' then held otherwise. 1 Sid. 408. and for this **vide Further** and **Further**, Cro. El. 471. 1 Brownl. 18. 2 Brownl. 185. Vaugh. 95. 100. 1 Vent. 199. (f) **Vide infra** pl. 6.

2. **It seems that Rent reserved upon a Lease which becomes due from the Executors, if it became due in the Time of the Executors, ought not to be satisfied before Judgments, or other Debts of the Testator, for this is the proper Debt of the Executors, for the Action shall be brought against them in the** Debet **and** Detinet, **as in** (g) Hargrave's **Case,** Co. 5.

(g) For this Case, and the Notes upon it, **vide** my second Part, 504. pl. 10.

3. (h) **But it seems otherwise of Arrears incurred in the Life of the Testator; but** Quære **this, for** Master Old **said to me, that it had been resolved the contrary, because it is real, for** (i) 11 H. 4. 79. b. **Acceptance of an Obligation, for it does not extinguish it, therefore higher.**

(h) 2 Vent. 184. this cited, — By Wentw. Off. of Exec. 209. between a Debt by Obligation and a Debt for Rent, or Damages upon a Covenant broken, there is no Difference or Priority, but it is at the Executor's Discretion to pay which he will first, as if all were by Bond, and **vide** Style 61. Salk. 326. (i) Br. Debt 64. S. C. Fitz. Bar. 185. S. C.

4. **A Judgment in the Life of the Testator ought to be satisfied before any Debt, for if the Executor suffers a Judgment against him at the Suit of another, and Execution, it is a** Devastavit **if he had not sufficient.** 21 E. 4. 21. b.

5. **The**

5. The Law is the ſame if the Teſtator be indebted of Record to the King, this is in Nature of a Judgment, and therefore it ought to be firſt ſatisfied. (a) 21 E. 4. 21. b.

(a) Br. Prerogative 71. S. C. Poſt Letter U. 6. which vide with the Notes there.

6. (b) Funeral Expences, (c) according to the Degree and Quality of the Deceaſed are to be allowed of the Goods of the Deceaſed, before any Debt or Duty whatſoever; for that is *opus pium* or *Charitativum*. 3 *Inſt*. 202.

(b) Vide ſupra pl. 1.
(c) In Strictneſs no Funeral Expences are allowable againſt a Creditor, except for Coffin, Ringing the Bell, Parſon, Clerk, and Bearers, but not for Pall or Ornaments. Salk. 296. —— Per Comb. 342. Holt ſaid 10l. was enough to be allowed for the Funeral of one in Debt. (Q. If it ſhould not be 10s.) for it was ſaid Baron Powel in his Circuit would allow but 11s. 6d. in the like Caſe, which he ſaid was all the neceſſary Charge.

7. (d) A Decree in Equity obliges Executors in equal Degree at leaſt with a Judgment at Common Law. *Paſch.* 5 *Will. & Mar.* between *Shaftoe* and *Powel*, *in Scaccario*, 3 *Lev.* 355. by three Barons againſt one.

(d) But for this vide 1 Rol. Rep. 86. Style 38. Salk. 507, —— Pending a Suit in Equity againſt him, or after a Decree quod computet, an Executor may pay another Debt of higher or as high a Nature, but this muſt be intended where he hath legal Aſſets, but if he hath equitable Aſſets only, a Court of Equity will not indemnify him, and ſuffer him to prejudice and diſappoint the firſt Suitor. Salk. 507. and vide 1 Vern. 369.

(T) Judgments in their own Time.

1. IF a Man brings Debt againſt an Executor, and pending this another brings Debt, and the firſt recovers, (e) he ſhall be firſt ſatisfied. 9 H. 6. 58.

(e) For this vide ſupra Letter K. 6. and the Notes there.

Where the Action is brought.

2. (f) If an Action be brought againſt an Executor in another County than where the Executor lives, before Notice that the Action is brought, he may pay the other Debts, becauſe it is in another County. 2 H. 4. 21. b. Curia Com. 279.

(f) In Littleton and Hibbin's Caſe, Cro. El. 793, and vide 1 Leon. 312. 2 Leon. 60. Wentw. Off. of Exec. 209.

3. (g) If an Action of Debt be abated by an Executor, in a new Action by Journeys Accounts, he ought to plead fully adminiſtred the Day of the firſt Writ purchaſed (therefore he cannot pay any Debt mean between the Abatement and new Writ). (h) 48 E. 3. 21. (i) 2 H. 4. 21.

(g) Aldrich and Walthal S. P. Cro. Jac. 579. 2 Rol. Rep. 187, 204, 209. and vide Winch 82. Hob. 248.

(h) Fitz. Adminiſtrator 18. S. C. Br. Adminiſtrator 14. S. C. Ante Letter Q. pl. 7. S. C.

(i) Fitz. Journeys Accounts 4. S. C. Br. Journeys Accounts 8. S. C.

(U) Executors, Adminiſtrators.

1. Debt for Wages by a Servant within the Statute of Labourers, ſhall be paid before ſimple Contract, (a) as it ſeems to me.

(a) But Q. and vide Wentw. Off. of Exec. 174, 175. Moor 698. pl. 971.

Contract.

2. (b) Debts upon ſimple Contract are to be paid before Legacies. Co. 9. Pinchon 90. b.

(b) 1 Sid. 333. S. P.

3. Dr. & Student 78. They are to be paid before Legacies in Conſcience, but it ſeems to the Doctor, and not denied by the Student, that if he pays the Legacies firſt, there is no Remedy for the Debtee.

4. Quære, if a Debt upon ſimple Contract be to be paid after a Debt for Wages by a Servant who is not within the Statute of Labourers.

5. 37 H. 6. 30. Per Priſ. Debts are to be paid before Legacies. 21 E. 4. (c) 23. b. 2 H. 6. 16.

(c) I ſuppoſe this is miſprinted in the Original, and ſhould be 21. b. which vide Br. Adminiſtrators 37.

6. (d) Debts to the King by Matter in (e) Deed, are all one with Debts of a common Perſon, and of them the Executor hath Election to pay which he will firſt. (f) 21 E. 4. 21.

(d) If there be Judgment againſt A. on Bond, &c.

who dies, and after another Obligee of A. aſſigns his Bond to the King, the Executors of A. may pay the Judgment, and it will be good againſt the King, in Reſpect the Debt due to the King was not upon Record before the Death of the Teſtator. Lane 65. per Cur'. (e) In the Original it is in fact. (f) Br. Prerogative 71. S. C. Ante Letter S. 5. S. C.

(X) What Debts ought to be firſt paid before Legacies.

1. If a Man binds himſelf in an (g) Obligation to perform a certain Thing, and deviſes ſeveral Legacies, and dies, leaving but ſufficient to ſatisfy the Obligation if it ſhall come to be forfeited, yet this Obligation ſhall not be any Bar of the Legacies, becauſe it is uncertain whether the Obligation ſhall ever come to be forfeited, (h) but the Executor ſhall make a conditional Delivery of the Legacies, viz if the Obligation be recovered againſt him, the Legatee ſhall redeliver the Legacy. Hill. 38 El. B. R. in (i) Necton and Sharp's Caſe.

Fol. 928.

(g) Eeles and Lambert L. P. upon a Covenant not broken, but no Judgment by Reaſon of a Fault in the Declaration.

All. 38, 39. Style 37, 54, 73. (h) Allen 40, 41. —— If Spiritual Court goes about to compel Payment of a Legacy without Security to refund, a Prohibition lies. 1 Vern. 93. (i) Moor 413. pl. 568. S. C. Ow. 72. S. C. Style 56. S. C. cited, and vide.

2. So if a Man being Under-keeper of Ludgate binds himſelf in an Obligation to the Sheriffs to keep all Priſoners ſafely, and alſo to ſave them harmleſs from all Eſcapes of Priſoners to be committed to them during their Sheriffalties, and after he ſuffers a

Priſoner to eſcape, by which the Debt is recovered againſt the Sheriff in a Writ of Eſcape, and ſo the Obligation is forfeited, yet if he gives ſeveral Legacies, and dies, not leaving ſufficient Aſſets but to ſatisfy the Obligation, the Executors ſhall not bar the Legatees by this Obligation forfeited, becauſe it may be that the Sheriffs will not ſue them upon the Obligation, but they ſhall deliver the Legacies conditionally, viz. if the Sheriffs recover againſt them, they ſhall redeliver the Legacies. Hill. 38 El. B. R. between (a) Necton and Sharpe.

(a) Cro. Eliz. 466, 467. S. C. adjudged, the Bond not being forfeited. Ow. 72. S. C. adjudged, Goulſ. 141. S. C. very ill reported.

Judgment.

(Y) In what Caſes the Judgment ſhall be *de bonis teſtatoris, ſi, &c. ſi non de bonis propriis.*

1. (b) If a Man recovers a certain Thing as a certain Debt, or, &c. and beſides this Damages for the Detinue, or otherwiſe, there the Judgment ſhall be for the Damages, de bonis teſtatoris, ſi, &c. ſi non de bonis propriis. Co. 8. Ma. Shiply 134. 34 H. 6. 23. b. 21 H. 6. 1. (c) 33 H. 6. 24.

(b) For this vide Palm. 279.

(c) Fitz. Judgment 38. S. C. Br. Executors 18. S. C.

2. If a Man recovers Damages in Detinue againſt an Executor for a Detinue after the Death of the Teſtator, the Judgment ſhall be for the Damages de bonis teſtatoris, ſi, &c. & ſi non, &c. contra 14 H. 4. 29. b.

(d) For this Rule vide Palm. 279.

3. (d) If a Man recovers againſt an Executor in an Action where his Recovery is all in Damages, there the Judgment ſhall be de bonis teſtatoris tantum.

4. As if a Man recovers in a Quare impedit againſt an Executor, where he makes Title in the Right of the Teſtator by Force of a forged Grant made to the Teſtator, the Judgment ſhall be de bonis teſtatoris tantum, for here all is to be recovered in Damages (it ſeems the ſix Months ought to be paſt). 34 H. 6. 23. b.

5. In Debt againſt three Executors, if two are outlawed, and the Third pleads fully adminiſtred, and Aſſets are found, the Judgment ſhall be againſt all for the Debt de bonis teſtatoris, and for the Coſts againſt him that pleaded only. Mich. 7 Jac. B. Partridge's Caſe, adjudged per Curiam upon Advice.

(Z) By what (e) Name an Action lies againſt Executors.

(e) If an Executor de ſon tort after takes out Adminiſtration, yet he may be charged as Executor or Adminiſtrator, vide ante Letter B. under Title Executor of his own Wrong.

1. An Action does not lie againſt an Executor and the Executor of an Executor, for this is repugnant, for the Survivor

shall have the Whole; but if the Executor of the Executor administers with the other, an Action lies against both by the Name of Executors. (a) 39 H. 6. 45. b. 46.

(a) Fitz. Executors 29. S. C. Br. Executors 99. S. C. Br. Joinder in Action 82. S. C.

(A) What (b) Acts or Pleas of one shall bind his Companion.

Fol. 929.

(b) A Devastavit by one shall not bind the others. Cro. El. 318.

1. IN an Action upon the Case against four Executors upon a Promise made by the Testator, if one of the Executors acknowledges the Action, and the other Three plead Non assumpsit, their Plea shall be received, because the Plea of that Executor which is best for the Testator shall be received; but the Executor who acknowledged the Action shall excuse himself from Damages thereby. Pasch. 13 Car. B. R. between Chaffe and Kelland, and others per Curiam, that the Pleas should be received; but Quære.

2. By the Stat. (c) 9 *Ed.* 3. *cap.* 3. In Debt against Executors, tho' the Sheriff upon the Summons as to some of them returns *Nihil*, yet an Attachment shall be awarded, and upon *Nihil* thereupon also returned, the great Distress shall be awarded, and then he or they who first appear shall answer, and tho' some of them before appeared and make Default at the Day of the Return of the great Distress, yet he or they who first appeared (d) at the Return of the great Distress shall answer; and if Judgment pass for the Plaintiff, he shall have his Judgment and Execution against them, who pleaded according to the Law (e) before used, and against all others named in the Writ of the Goods of the Testator, as well as if they had all pleaded.

(c) For the Exposition of this Statute, Wentw. Off. of Exec. 138, 139, &c.

(d) Where one appearing upon the Summons, confessed the Action, it was held not within the Statute. Cro. Car. 564.

(e) It seems that by the Common Law one Executor might confess the Action and bind the others, so that they should not be after admitted to plead any Discharge, &c. for as one Executor might give all the Goods, so by the same Rule, he might by his Confession charge them. Kelw. 22, 23. 1 Brownl. 78. 2 Brownl. 186, 187, 274. —— But if an Executor of his own Wrong was sued together with the rightful Executor, his Confession should not bind the rightful Executor. 1 Brownl. 78. 2 Brownl. 186, 187. —— When Executors have appeared, if any one of them will confess the Action, this binds and concludes the rest; but if one will plead one Plea, and the other another; some say that shall be received which is best for the Testator's State. Wentw. Off. of Exec. 140.

Judgment.

(B) In what Cases it shall be given against the Executors, and how.

1. IN Debt against an Executor, if the Defendant pleads fully administred, if there are any Assets found in his Hands, tho' it be not to the Value of the Debt, (f) yet the Plaintiff shall have Judgment for all his Debt de bonis testatoris. 17 E. 3. 66. b. adjudged, 34 H. 6. 24. b. Co. 8. Ma. Shipley 134. Trin. 12 Jac. B. R. between (g) Lee and Ridford adjudged.

(f) For this vide 1 Leon. 67. Godb. 178. Waterhouse and Woodstreet, Cro. El. 592. Cro. Car. 167. Hut. 28. All. 37, 38. Wentw. Off. of Exec. 274.

(g) 1 Rol. Rep. 58. S. C. adjudged, and affirmed upon Error in the Exchequer Chamber.

2. (a) But

(a) Gaudy and Ingham, Style 88. Diverſity where Aſſets in Part, and where no Aſſets found.

2. (a) But if it be found that he had nothing in his Hands, the Judgment ſhall be quod querens nihil capiat per breve, and he ſhall not have Judgment of the Debt, for he hath waived that Advantage by Taking of Iſſue, and Judgment is to be given upon the Verdict. 34 H. 6. 24. b. contra 33 H. 6. 24. Curia.

All. 37, 38. but this Diverſity not taken, and vide Cro. Car. 373.

(b) How Judgment ought to be given in ſuch Caſe, vide Noy 120.

(c) Yet in the Caſe of Rock and Leighton, Salk. 310. 6 Mod. 308. it was held per Cur', that if an Executor confeſſed or ſuffered Judgment by Default, he admitted Aſſets, and was eſtopped to ſay the contrary, and vide 6 Mod. 143.

3. (b) In Debt againſt an Executor, if he pleads fully adminiſtred, and the Plaintiff replies, that he hath Aſſets, and after the Defendant relicta verificatione cognovit actionem, nec quin ipſe detinet, upon which Judgment ſhall be given againſt the Defendant, but not that he hath Aſſets, for the Conuſante naturally extends only to the Declaration which is of the Debt, and (c) not of the Aſſets; but if the Defendant will confeſs more he may, but otherwiſe the Confeſſion is but a Diſavowing his Plea of Plene adminiſtravit. (d) Hob. 240. between Bird and Culmer.

(d) Hob. fol. 178. S. C.

4. If A. recovers Debt and Damages againſt B. and after B. dies, and after a Scire facias to have Execution is brought againſt four Perſons C. D. E. and F. as Executors to B. and in the Writ it is ſuppoſed, that B. made the ſaid four Perſons his Executors, and all the four Perſons appear and plead fully adminiſtred, and the Jury find that C. had 100l. Aſſets in his Hands, and D. 40l. Aſſets in his Hands, and that E. and F. had no Aſſets, in this Caſe the Judgment ought to be againſt all the four Perſons to recover of the Goods of the Teſtator in as much as they are all named Executors, and they ſo take it upon them and plead accordingly.

(e) Cro. Car. 286. S. P. but S. P. does not appear.

Mich. 9 Car. Camera Scaccarii, between (e) Nevell and Delabar and others per Curiam, where the Judgment being to recover of the Goods of the Deceaſed 100l. againſt C. and 40l. againſt D. and that the other Two ſhould go without Day, it was held per Curiam to be erroneous, becauſe it was not againſt all; but becauſe the Writ of Error to reverſe it, and firſt Judgment was brought by C. and D. only without the other Two, it was held per Curiam the Writ of Error ought to abate. But this Judgment was after affirmed per Curiam, and the Writ adjudged good in as much as the two Plaintiffs in the Writ of Error were only grieved by the Judgment, and the Judgment well given in B. R. Intratur Hill. 7 Car. B. R. Rot. 198.

5. In an Action of Debt againſt two Executors, if they plead ſeverally by ſeveral Attornies fully adminiſtred, and the Jury find that one had Aſſets, and the other none, the Judgment ſhall be only againſt him who is found to have had the Aſſets, and that the other who had not Aſſets ſhall go quit. Mich. 15 Car. in Camera Scaccarii, in a Writ of Error upon ſuch Judgment in B. R. adjudged per Curiam, and the firſt Judgment affirmed accordingly. Intratur Trin. 14 Car. B. R. Rot. 1288. Bellew and Juckleden.

Fol. 930.

6. In an Action againſt two Executors, if one be waived or outlawed, and the other appears upon the Attachment in Banco, the Record being attachiatus eſt, and the Plaintiff declares againſt him that appears, who pleads to Iſſue, and there is a Verdict for the Plaintiff, the Plaintiff ſhall have Judgment againſt both of the Goods of the Deceaſed, and if not of Damages againſt him that pleads. Trin. 16 Car. B. R. between Chamberlyn and Nicholls, adjudged in a Writ of Error upon ſuch Judgment in Banco, and the Judgment affirmed accordingly.

7. (a) If in Debt againſt an Executor he pleads fully adminiſtred, the Plaintiff may confeſs the Plea and pray Judgment *de bonis teſtatoris quæ ad manus Defendentis in futuro pervenerint*, &c. and after ſuch Judgment upon a Suggeſtion of Aſſets, after *come* (b) may have a *Scire facias*, &c. *Trin.* 22 *Car.* 2. between (c) *Noel* and *Nelſon*, *Went.* 94, 95. adjudged, and that Judgment affirmed upon a Writ of Error.

(a) In the Caſe of Mary Shiply, 8 Co. 134. S. P. per Cur', but being cited in the Caſe of Dorchester and Web. Cro. Car. 373. it was denied to be Law. —— But vide Wentw. Off. of Exec. 274. Cro. El. 592. (b) For ſuch Scire facias, vide Waterhouſe and Woodſtreet, Cro. Eliz. 592. Gibſon and Brook, Cro. El. 887. Moor 246. pl. 386. Hob. 199. Cro. Car. 373. (c) 1 Lev. 296. S. C. adjudged, 2 Saund. 226. S. C. adjudged and affirmed upon Error brought in Parliament. 1 Sid. 448. S. C. adjudged, 2 Keb. 606, 607, &c. S. C.

Judgments againſt Executors.

(C) Judgments General.

1. (d) Co. 9. Mountjoy. In an Action upon an Aſſumpſit of the Adminiſtrator in Conſideration that Adminiſtration was committed to him, and that he had Aſſets to pay, &c. he aſſumed to pay the Debt due by the Teſtator, the Defendant pleads Non aſſumpſit, and it is found againſt him, and a general Judgment given, and not de bonis defuncti. Co. 9. Bane 94.

(d) Wheeler and Collier S. P. Cro. El. 466. adjudged by all the Judges con. Popham. Moor 419. pl. 571. Court divided. —— For this vide 1 Leon. 94. 2 Lev. 122.

2. (e) If the Executor pleads Ne unque Executor, &c. and he is found Executor, Judgment ſhall be general to recover the Debt. (f) 46 E. 3. 10. 1 R. 3. 3. for his falſe Plea. 9 H. 6. 44. b. (g) 11 H. 6. 8. 16 Hill. 12 Car. B. R. in a Writ of Error brought there (h) Lien de Adminiſtrators between Creſwell and Green, and Judgment given to recover de bonis teſtatoris contra Brook, that it ſhould be a conditional Judgment. 11 H. 6. 16. b. in the Court of Lynn, reverſed for theſe Cauſes. Intratur Hill. 11 Car. Rot. 234.

(e) For this Point vide Noy 67. 1 Saund. 217. (f) Br. Executors 34. S. C. Fitz. Executors 72. S. C. (g) Br. Debt 178. S. C. (h) So is the Original; Q. How to be tranſlated.

3. So in an Action againſt ſeveral Executors, and one pleads Ne unques Executor, &c. if it be found againſt him, the Judgment ſhall be general againſt him to recover the Debt. (i) 46 E. 3. 3.

(i) Br. Executors 34. S. C. Fitz. Executors 72. S. C.

4. But if Aſſets be found in the Hands of the other Executor for Part of the Debt, then the Judgment againſt the other who pleaded the falſe Plea, ſhall be to recover the Reſidue of the Debt. (k) 46 E. 3. 10. (l) 11 H. 6. 37. b. contra 11 H. 6. 7. b. 16. b.

(k) Br. Executors 34. S. C. Fitz. Executor 72. S. C. (l) Br. Debt 178. S. C.

5. Nota, That in theſe Caſes, if it appears to the Court as by the finding of the Jury, that the Executor had not Aſſets in his Hands, then upon ſuch falſe Plea the Judgment ſhall be general; for it would be in vain to give Judgment of the Goods of the Deceaſed, if he had, &c. when it appears he had not any, and ſo the Caſes above are to be intended, for ſo is 46 E. 3. 10.

6. If fully adminiſtred be pleaded in Debt, and found againſt the Executor, the Judgment for the Damages ſhall be general.

(a) Br. Executors 51. S. C. Fitz. Judgment 68. S. C.

(a) 11 H. 4. 5. 11 H. 6. 39.

7. So in Detinue the Judgment for the Damages ſhall be general. 11 H. 6. 39.

8. In an Action of Debt againſt an Executor, who pleads Ne unque Executor ne unque adminiſtravit as Executor, and it is found againſt him, the Judgment de bonis teſtatoris, ſi, &c. if not de bonis propriis, as well for the Debt as Damages and Coſts. Trin. 15 Car. B. R. between Street and Wiſe in a Writ of Error upon ſuch Judgment in Totneſs in Devon, and this aſſigned for Error, yet the Judgment affirmed per Curiam, becauſe ſo is the common Courſe. Intratur Hill. 14 Car. Rot. 751.

9. In an Action of Debt againſt Baron and Feme, as Executors of A. upon which Judgment is given againſt them by Nihil dicit de bonis teſtatoris, ſi, &c. and if not for Damages and Coſts de bonis propriis, and after a Devaſtavit is returned againſt the Defendants, the Judgment ſhall be to recover the Debt, Damages and Coſts de bonis propriis of the Baron and Feme. Mich. 14 Car. B. R. between (b) Mounſon and Bourn, Hill. 14 Car. adjudged per Curiam after Arguments at the Bar, becauſe it is the common Courſe, tho' the Wife cannot properly Convert to her own Uſe, for ſhe may have Goods * as Executrix, tho' ſhe be a Feme Covert, and perhaps the Husband is charged only for Conformity in Reſpect of the Wife.

(b) Cro. Car. 519, 527. S. C. 1 Jon. 417, 418. S. C.

* Fol. 931.

10. In Debt againſt an Executor for Rent upon a Leaſe for Years incurred after the Death of the Teſtator, if the Plaintiff recovers, the Judgment ſhall be general. 14 H. 4. 29.

11. If A. recovers againſt B. Debt and Damages, and after B. dies, and Adminiſtration is granted to C. his Wife, who waſtes the Goods, and after takes D. to Husband, and a Fieri facias is awarded de bonis teſtatoris in the Hands of D. and C. and the Sheriff returns Nulla bona, &c. and upon this upon a Surmiſe that they have waſted the Goods, another Writ is awarded to the Sheriff, ſi ſibi conſtare poterit per inquiſitionem, that they have waſted the Goods, then to warn them to ſhew Cauſe why Execution ſhould not be de bonis propriis, and thereupon the Sheriff takes an Inquiſition, which finds this Matter, and refers it to the Court, whether the Husband and Wife have waſted the Goods of the Teſtator, and converted them to their Uſe, according to the Writ, or not; upon this Special Matter returned the Court awarded Execution of the proper Goods of the Baron and Feme, for the Sheriff had returned the Special Matter, and by that the Husband was to be charged for the Converſion of the Wife. Mich. 16 Car. B. R. between (c) Knight and Hilton and his Wife Adminiſtratrix, and Copping, adjudged per Curiam.

(c) Cro. Car. 603. S. C. adjudged.

(D) In what Caſes it ſhall be *de bonis teſtatoris* only.

1. IF there be a Recovery of a Debt againſt an (a) Executor by Nil dicit, the Judgment ſhall be de bonis teſtatoris only. 25 E. 3. 41. b.

(a) Where againſt an Executor of an Executor de bonis of the firſt Teſtator only. 1 Leon. 68.

2. If an Executor pleads in Abatement, that another Executor adminiſtred not named, and it is found againſt him, the Judgment ſhall be of the Goods of the Teſtator only. 11 H. 6. 8. dubitatur, 9 H. 6. 44. b. contra 7 H. 4. 13.

3. If upon fully adminiſtred pleaded, it be found againſt the Executor, Judgment ſhall be of the Debt of the Goods of the Teſtator only. 7 H. 4. 13. 11 H. 4. 5. 9 H. 6. 44. b. 11 H. 6. 8.

4. In Debt againſt an Executor, if he pleads a falſe Acquittance, and it is found againſt him, yet he ſhall be charged de bonis teſtatoris only, (b) for he doth not Eſtrange himſelf from the Will by this Plea. Contra 11 H. 6. 8.

(b) In the Caſe of Bull and Wheeler, Cro. Jac. 648. and Palm. 314. it is ſaid that an Executor by no act or falſe Plea ſhall be charged de bonis propriis, but where he pleads Ne unque Executor, and eſtranges himſelf from the Will; and vide Palm. 280.

5. In Debt againſt an Executor upon an Obligation made by the Teſtator, if the Executor denies the Deed, and it is found againſt him, the Judgment ſhall be only de bonis teſtatoris. Contra 17 E. 3. 20. 45. b. adjudged.

6. (c) In an Action of Debt againſt an Executor, if the Defendant pleads a Judgment had againſt him in a former Action brought againſt him by another, and that he hath nothing in his Hands but to ſatisfy it, and the Plaintiff replies, that the Judgment was acknowledged by Covin to defraud the Creditors, which is found accordingly; tho' this falſe Plea is found againſt him, yet the Judgment ſhall be only de bonis teſtatoris. Trin. 42 El. B. R. between Borret and Boyes adjudged.

(c) Bracebridge and Baskervil S. P. 1 And. 150. adjudged, 1 Leon. 67. but the Point does not thereby fully appear.

7. If a Man recovers Damages againſt an Executor or Adminiſtrator in an Action of Covenant againſt him upon a Breach of Covenant by the Teſtator, the Judgment ſhall be de bonis teſtatoris only, becauſe he could not have prevented it, and here the Duty is recovered all in Damages. Mich. 37 El. B. R. between Holt and Hore, agreed per Curiam.

8. So the Judgment ſhall be de bonis teſtatoris only, tho' the Covenant was broke by the Executor or Adminiſtrator himſelf; becauſe all the Duty is to be recovered in Damages in this Action. Mich. 37 El. B. R. in Holt and Hore's Caſe held. (d) D. 15 El. 324. 34. adjudged, Mich. 21 Jac. B. R. between (e) Bridgeman and Lightfoot adjudged in a Writ of Error, and Judgment given in B. de bonis teſtatoris, ſi, &c. & ſi non, &c. de bonis propriis reverſed; where the Caſe was, that the Leſſee for Years of an Advowſon granted the next Avoidance * to B. who covenanted, that if he would grant this Preſentation to any Body, the Leſſor ſhould have the Offer and Refuſal thereof, B. dies, and his Executor grants it to another without any Offer made to the Leſſor, upon which the Leſſor brings an Action of Covenant againſt the Executor, who pleads Non conceſſit, and it is found againſt him, and Damages given, &c. and it ſeemed to the Court that this was only a Non-feaſance,

(d) Palm. 314. S. C. cited, Cro. Jac. 672. S. C. cited.

(e) Cro. Jac. 671. S. C. adjudged, 2 Rol. Rep. 415. S. C. adjudged.

* Fol. 932.

feasance, and no Act done by the Executor. Hobart's Rep. 254. between (a) Collins and Thoroughgood adjudged, where the Breach was for Want of Reparation by the Executor.

(a) Hob. fol. 188. S. C.

9. (b) In an Action of Debt against an Executor upon an Obligation, of which the Condition is to perform Covenants, and a Breach assigned in doing a Thing by the Executor against a Covenant, and it is found against the Executor, (c) tho' the Breach of the Obligation was by the Executor himself, yet Judgment shall be de bonis testatoris only. Hobart's Reports Case 362. between (d) Castillion and Smith adjudged.

(b) Bull and Wheeler S.P. Cro. Jac. 647. adjudged, Palm. 314. adjudged.

(c) But for this vide Wentw. Off. of Exec. 280. adjudged.

Moor 69. pl. 188. Dal. 70. 1 Saund. 112.

(d) Hob. fol. 283. S. C. Hut. 35. S. C.

(E) Execution of it.

1. If an Execution issues to the Sheriff to levy the Debt of the Goods of the Testator, if the Executor had sold the Goods of the Testator before the Writ purchased, and had taken Money and other Goods for the said Goods, the Sheriff cannot make Execution of his proper Goods, but ought to return it to the Court. 2 H. 6. 12. admitted, contra 14 H. 4. 12. b. adjudged.

2. (e) If *in Banco* a Judgment is given against Executors to recover a Debt *de bonis Testatoris*, and thereupon a *Fieri facias* issues, and the Sheriff returns *nulla bona*, upon which an Entry is made in the Roll *quod testatum est*, that the Executors have sold several Goods of the Testator, and converted the Money to their own Use, upon which a Writ is awarded to inquire what Goods were wasted, and the Sheriff returns an Inquisition, by which found, that several Goods of the Testator to the Value of the Debt, were wasted by the Executors, and thereupon a *Scire facias* to shew Cause why Execution should not be of their own Goods, and upon two *Nihils* Execution is awarded; this is erroneous, for tho' the Inquisition is false the Parties are without Remedy, and it might be mischievous to Executors who might not have Notice, the Action sometimes being brought in a foreign County. *Hill.* 45 *Eliz. Pettifer's* Case, 5 *Co.* 32. adjudged in *B. R.* upon a Writ of Error *in redditione Executionis* only, and the Execution reversed, but Judgment stood.

(e) Mounson and Bourn, 1 Jon. 417. said to be S. C. as this of Pettifer, save that the Executors upon the Scire facias were warned, appeared and demured, and upon a Respondeas ouster, Judgment given de bonis propriis, and upon a Writ of Error affirmed by the whole Court, and said, admitting Pettifer's Case Law, which they neither absolutely affirmed nor disaffirmed, yet this Case stands on good Reason. In Pettifer's Case, the Judgment was on Nihil returned, but here was Warning returned and an Appearance, and the Parties might have pleaded they had not wasted the Goods, so that if there was any Prejudice it was by their own Default in not traversing the Waste; and the Court advised the Clerks to use this Course hereafter, as a good and legal Course for the Expedition of Justice and Execution. Cro. Car. 518, 526, 527. S. C. adjudged, and said it differed from Pettifer's, and vide Gibson and Brook, Cro. El. 859. Ow. 132, 133. Lit. Rep. 47. Palm. 280. 2 Sid. 103, 104. Style 56, 57. Skin. 85, 86.

3. But if Judgment is given against Executors, and upon a *Fieri facias nulla bona* returned, the Plaintiff may have a special Writ of *Fieri facias*, to levy the Debt of the Goods of the Deceased, & *si sibi constare poterit*, that the Executors have wasted the Goods, then *de bonis propriis*, which is agreeable with Law and Reason; for if the Sheriff makes a false Return, the Parties may have Remedy by Action. In *Pettifer's* Case, 5 *Co.* 32. *per Curiam.*

(F) In what Caſes it ſhall be *de bonis teſtatoris*, if he hath, *ſi non de bonis propriis*.

1. IN Debt againſt Huſband and Wife Executor in the Right of the Wife, if Plaintiff recovers, and the Sheriff returns, that the Huſband hath converted the Goods, the Plaintiff ſhall have Execution de bonis propriis of the Huſband. 18 H. 6. 4. b.

2. Upon a Judgment againſt Executors to recover of the Goods of the Teſtator, if the Sheriff returns that the Goods are eſſoined, the Judgment ſhall be of their proper Goods. 9 H. 6. 57. b. Curia.

3. So if he returns that the Goods are waſted. 11 H. 6. 16. 35. b.

4. Upon a Judgment of the Goods of the Deceaſed, if the Sheriff returns that he had ſuch Aſſets, but had waſted them, upon this Return the Judgment ſhall be of the Goods of the Deceaſed, if he hath, if not de bonis propriis. 11 H. 4. 70.

5. But vide 2 H. 6. 12. b. (a) a Capias awarded upon ſuch Return, and ſo Judgment abſolute of his proper Goods. 11 H. 6. 7. b.

(a) That a Capias ad Satisfaciendum lies not againſt Executors but where a Devaſtavit is returned by the Sheriff, or that he returns they have no Goods of their Teſtator's. Moor 69, 70. pl. 188. Dal. 76, 71. 1 Brownl. 50. Aldworth and Peel, Cro. Eliz. 530.

6. Upon fully adminiſtred pleaded, if 20l. Aſſets be found, and Judgment thereon, and the Sheriff returns Quod non Habet Aſſets in Balliva ſua, Judgment ſhall be de bonis teſtatoris, ſi, &c. if not de bonis propriis. 9 H. 6. 9. b.

7. So if he returns that they have not Aſſets within his Bailiwick, prout ei conſtare poterit, becauſe it appears in a Manner, that the Goods are eſſoined, the Judgment ſhall be to recover of the Goods of the Deceaſed, & ſi vicecomiti conſtare poterit, that they are eſſoined, de bonis propriis. 9 H. 6. 58.

8. So if the Sheriff returns that he had nothing of the Goods of the Deceaſed, upon a Suggeſtion made by the Plaintiff, that he hath alienated the Aſſets, he ſhall have a Special Writ, ſcilicet ſi ita ſit, to make Execution of his proper Goods. 11 H. 6. 8. 35. b.

9. If a Man recovers Debt and Damages againſt an Executor, he ſhall recover Damages de bonis teſtatoris, ſi, &c. ſi non de bonis propriis. Co. 8. Mary Shiply 134. dubitatur. 3 H. 6. 5.

10. In an Action againſt ſeveral Executors, if one pleads Ne unque Executor, and the other pleads fully adminiſtred, or the like, and this is found againſt them, the Judgment ſhall be of the Goods of the Deceaſed againſt all, ſi non * de bonis propriis againſt him who pleaded Ne unque Executor, &c. contra 11 H. 6. 37. b.

* Fol. 933.

11. In an Action of Debt againſt an Executor, if the Defendant appears at the Return of the Summons, and makes Defence, & nihil dicit in barram, upon which Judgment is given againſt him by Nihil dicit, the Judgment ſhall be as to the Damages and Coſts de bonis teſtatoris ſi, &c. and if not de bonis propriis. Hill. 14 Car. B. R. between (b) Mounſon and Bourn, adjudged per Curiam in a Writ of Error upon ſuch Judgment in Banco, for this is the uſual Courſe. Intratur.

(b) Cro. Car. 519. S. C.

12. If the Executor comes at the Firſt, viz. at the Return of the Summons, and acknowledges the Action, yet Judgment ſhall be given againſt him as to the Damages and Coſts de bonis teſtatoris,

(a) Cro. Car. 519,526.S.C. adjudged, for

ſi, &c. & ſi non de bonis propriis in the ſaid Caſe. (a) Mounſon and Bourne, Hill. 14 Car. held by Brampſton.

it is not the Confeſſion, but Delay, which is the Cauſe the Plaintiff ſhall recover Damages de bonis propriis. 1 Jon. 417, 418. S. C. but S. P. does not appear.

13. If the Executor at the firſt Day, viz. at the Return of the Summons, acknowledges the Action, and ſaith he hath not Aſſets, the Judgment ſhall be for the Coſts and Damages de bonis teſtatoris, if it be true in the ſaid Caſe held by Brampſton.

14. If the Executor comes at the Return of the Summons, and pleads that he hath been always ready, and yet is; if it is true, the Judgment ſhall be only de bonis teſtatoris for Coſts and Damages in the ſaid Caſe of Mounſon, per Brampſton.

15. In an Action againſt an Executor or Adminiſtrator, if the Defendant pleads Ne unque Executor, nor ever adminiſtred as Executor, and it is found againſt him, the Judgment ſhall be de bonis teſtatoris, ſi, &c. ſi non de bonis propriis for his falſe Plea.

16. But if a Man recovers Debt or Damages againſt the Teſtator, and after ſues a Scire facias againſt the Executor or Adminiſtrator, who pleads Ne unque Executor, nor ever adminiſtred as Executor, and it is found againſt him; yet the Judgment ſhall be only de bonis teſtatoris, becauſe he prays in the Writ of Scire facias to have Execution of the Goods of the Teſtator, and therefore againſt his own Prayer he ſhall not have Execution of his proper Goods. Mich. 3 Car. B. between Waldron and Berry, adjudged per Curiam.

17. If in Debt on a Bond againſt Husband and Wife as Adminiſtratrix, they plead Payment by her after the Death of the Inteſtate, according to the Condition of the Bond, and Iſſue being taken thereon, it is found for the Plaintiff, and Judgment given to recover *debitum de bonis teſtatoris, & ſi non, &c.* Damages *de bonis ſuis propriis*, tho' this be a falſe Plea of Matter in their own Conuſance, yet not eſtranging them from the Inteſtate, the Judgment for the Debt ought to be *de bonis teſtatoris*, and as to the Judgment for the Damages, tho' objected a Feme Covert could have no Goods, yet the Husband being only charged in Reſpect of her, and ſhe might have Goods if ſhe ſurvived, which might then be taken in Execution, the Judgment is good. *Mich. 5 Jac.* between *Johns* and *Adams*, *Cro. Jac.* 191. adjudged.

Adminiſtration.

Upon the Statute 21 Hen. 8. cap. 5.

1. By 21 *H.* 8. *c.* 5. Adminiſtration (a) ſhall be (b) granted to the (c) Widow of the Inteſtate, (d) or to (e) his (f) (g) next (h) of (i) Kin, or both at the Diſcretion of the Ordinary, taking Sureties of him or them for the true Adminiſtration of the Goods, Chattels and Debts, and where ſeveral claim the Adminiſtration as next of Kin, being in equal Degree, the Ordinary may accept one or more making Requeſt where divers require the Adminiſtration.

(a) But if granted to a Stranger it is good till repealed, and his Acts done before, even pending a Citation to repeal it, are good. Packman's Caſe, 6 Co. 18. b. Cro. El. 459, 460. Moor 396. Pl. 507. but vide 1 Brownl. 51. (b) When granted the abſolute Intereſt in the Goods of the Inteſtate is veſted in the Adminiſtrator, and the Ordinary hath nothing more to do, and he cannot now as formerly repeal the Adminiſtration at his Pleaſure. Levanne's Caſe, Cro. Car. 201, 202. adjudged, 1 Jon. 228. adjudged, Slawny's Caſe, Hob. 83. Moor 864. pl. 1191. Hugh's Caſe, Cart. 125. with a long Argument thereon. —— But that upon this Act he was not bound to diſtribute the Surplus remaining after Funerals and Debts paid. Winch 11. Noy 24. 1 Brownl. 32. Hetl. 134. Cro. Car. 62. All. 56. Palm. 517. March 13, 93. Raym. 499, 500. 1 Lev. 233. Cart. 125. Lit. Rep. 21, 37. Style 102, 439, 456. —— And that an Adminiſtration being well granted, according to the Statute, cannot be repealed without Cauſe, as Lunacy, vide Price and Parker, 1 Lev. 157. 1 Sid. 280, 8. Offley and Beets, 1 Lev. 186. 1 Sid. 293, 370, 371. 2 Keb. 63, &c. and vide Cro. El. 163. All. 36. 2 Brownl. 119. Style 10. Latch 68. Skin. 155, 156. 2 Show. 486. 3 Mod. 23, 24, 90. —— But may for juſt Cauſe, as if after granted the Adminiſtrator becomes a Lunatick. 1 Sid. 372, 373. —— So where granted irregularly or inverſo ordine. 1 Lev. 305. —— So if granted to Husband and Wife, where it ſhould have been to the Wife only. Brown and Wood, All. 36. Style 74. —— So if granted by Fraud or Surpriſe. Fitzg. 303, 304. (c) By preferring the Wife and Children to the Adminiſtration, the Statute imitates the Mind of the Inteſtate, to prefer thoſe that it is like he would have preferred if he had made a Will, by giving them the Profit, and not only the Labour in getting in the Effects, &c. Hob. 83. per Hobart. (d) To the one or the other at the Election of the Ordinary. Fortree and Fortree, 1 Shor. 351. 1 Salk. 36. and Comb. 289. 2 Vern. 125. —— Or Part to one and Part to the other. 1 Salk. 36. —— But after granted to one, he cannot revoke it, and grant it to another. Sir George Sands's Caſe, 1 Sid. 179. Raym. 93. (e) Where to the next of Kin of the Reſiduary Legatee, and not of the Inteſtate. Dyer 372. a. 1 Jon. 225. 2 Rol. Rep. 159. 1 Sid. 281. See Thompſon and Butler, 2 Lev. 55. 1 Vent. 217, 218. 3 Keb. 23. and Fitzg. 206, 207. Wentw. Off. of Executors 50. Raym. 500. —— Or to the next of Kin to one who dies intitled to the whole Surplus of the Perſonal Eſtate of another upon the Statute of 22 & 23 Car. 2. Skin. 213, 222. (f) To the Father or Mother as next of Kin, as it hath been often reſolved contrary to Br. Adminiſtrators 47, vide 3 Co. 40. 2 Show. 307. — To the Grandmother as nearer of Kin than the Aunt. Salk. 38, 251. (g) Where Two are in equal Degree, it may be granted to either of them. Style 451. —— But if granted to one, and after repealed, quia granted improvidè, viz. within fourteen Days, it muſt be granted to the ſame Perſon again. 1 Sid. 293. (h) The Half-blood eſteemed as near as the Whole. Brown and Wood, All. 36. Style 74. Caſes in Parliament 108. (i) If the next of Kin be incapable, as if attainted or excommunicate, it may be granted to another, and after the Impediment is removed, repealed, and granted to him. 1 Sid. 373.

2. And after laying a Penalty of 10*l.* upon every Ordinary, *&c.* which ſhould Act contrary to the ſaid Statute, it is thereby further provided, that the ſaid Act ſhall not be prejudicial to any Ordinary, *&c.* but that he (k) may convent before him any Perſon named Executor in any Teſtament, to the Intent to prove or refuſe, and to bring Inventories, and do every Thing concerning the ſame as they might do before the making this Act, *&c.*

(k) Tho' an Executor hath been ſworn to bring in an Inventory, and the Time appointed elapſed, yet if it appears there is no Occaſion for it, or for other good Reaſons, the Ordinary may diſpenſe therewith. Raym. 470. and vide 5 Mod. 247.

(a) *Diſtribution.*

(a) Skin. 219, 220. 3 Mod. 58.

(a) *Diſtribution.*

1. By the Statute of 21 *H.* 8. upon granting Adminiſtration, the Ordinary was to take Security from him or them to whom granted, for the true Adminiſtration of the Goods, Chattels, and Debts of the Inteſtate; but the Ordinary could not impoſe any other or (b) further Condition in the Bond, as after Debts and Legacies paid to diſtribute the Surplus as the Court ſhould direct, tho' the Ordinary would pretend that the true Adminiſtration in the Act mentioned was to be extended as well to the Diſpoſition of the Surplus as Payment of the Debts. (c) *Slawning*'s Caſe, *Hob.* 83. *per Curiam.*

(b) That ſuch Clauſe was for a long Time uſed to be inſerted in their Bonds, and the Ordinary to diſtribute accordingly. Raym. 498. 3 Inſt. 150. 4 Inſt. 336. —— 'Till about 12 Jac. 1. and there was no Prohibition before granted. 3 Mod. 60. (c) Moor 864. pl. 1191. S. C. but ſaid the Point being of great Conſequence adjourned. —— But that ſuch Adminiſtrator had by the Statute an Intereſt veſted in him, and could not be obliged to diſtribute the Surplus. Vide my Notes upon this Statute ante 407.

(d) This was a temporary Act made only for ſeven Years, but by 30 Car. 2. cap. 6. was continued for ſeven more, and by the 1 Jac. 2. cap. 17. made perpetual. (e) Tho' Inteſtate died before the Commencement of the Statute, ſuch Bond may be taken and Diſtribution made. 2 Vern. 642.

2. By (d) 22 & 23 *Car.* 2. *Stat.* 2. *cap.* 10. The Ordinary, (e) upon granting Adminiſtration ſhall take ſufficient Bond from the Perſon to whom committed, with Two or more able Sureties, according to the Value of the Eſtate conditioned, that the Adminiſtrator ſhall make a true and perfect Inventory of all the Goods, Chattels, and Debts of the Deceaſed, and exhibit the ſame into the Regiſtry of, *&c.* before, *&c.* and ſuch of them as ſhall come to his, or the Hands and Poſſeſſion of any other Perſon for him, ſhall (f) truly adminiſter according to Law, and make a juſt and true Account of his Adminiſtration (g) at or before, *&c.* and the Reſt of the Goods, *&c.* which ſhall be found remaining upon the Account (the ſame being firſt examined and allowed by the Court) ſhall deliver and pay to ſuch Perſon as the Judge by Decree (h) purſuant to the Intent of this Act ſhall appoint, and if it after appears any Will was made, and the Executor therein named exhibits the ſame in Court, requeſting that it ſhould be allowed and approved; and being ſo, the Adminiſtrator being thereunto required, ſhall deliver up the ſaid Letters of Adminiſtration in Court.

(f) This is intended in bringing in his Account, and not in paying the Debts of the Inteſtate, and therefore a Creditor ſhall not take an Aſſignment of the Bond, and ſue it, and for Breach aſſign Non-payment of a Debt to him, or a Devaſtavit committed by the Adminiſtrator, for that would be endleſs and infinite. 1 Salk. 316. 1 Lutw. 882, 884. but vide Vaugh. 96. (g) He muſt account accordingly without Citation or Suit, and this Account muſt be in Court, and if he comes at the Day and no Court is held, he ſhall be excuſed. 1 Salk. 316. and vide 1 Salk. 172.

(i) But 1 Vern. 134. it is ſaid the Ordinary hath but a lame Juriſdiction, and

3. — And by the ſame Act Ordinaries, *&c.* (i) may call ſuch Adminiſtrators to account, and order Diſtribution of what remains after Debts, Funerals, and juſt Expences allowed, (k) according to (l) the Laws in ſuch Caſes uſed, and the Rules after ſet down, ſaving to Perſons aggrieved their Appeal.

there being no negative Words in the Act, a Bill for Diſtribution properly lies in Chancery. 2 Vent. 362. 2 Chan. Caſ. 95. —— And indeed where the Surplus of the Perſonal Eſtate for Want of Diſpoſition by the Will is diſtributable, there can be no Suit for it in the Spiritual Court. 5 Mod. 247. having no Authority when a Will is made. Fitzg. 126. (k) In making Diſtribution before this Statute the Eccleſiaſtical Courts always obſerved two Rules: 1ſt, Repræſentatio in filiis fratrum & ſororum tantum locum habet, ad ulteriores vero collaterales non extenditur. 2dly, Where there are no Brothers or Siſters Children, vocantur ad ſucceſſionem reliqui collaterales quicunq; in gradu ſint proximiores remotioribus excluſis. Raym. 506. ſo certified by ſeveral of the Doctors. (l) The Canon Law. 2 Jon. 93. 2 Vern. 170.

4. Saving the Cuſtoms of (a) *London*, Province of *York*, and other Places having known and received Cuſtoms.

(a) As to the third Part of which the Inteſtate had Power to diſpoſe, but did not, it ſeems to be liable to a Diſtribution within the Act. Vide Percival and Criſp, 2 Jon. 204. Skin. 26, 41. 1 Vern. 134, 305, 314, 315, 432, 465. 2 Vern. 274. —— And by the Statute of 1 Jac. 2. cap. 17. for determining ſome Doubts ariſen, it is declared, that this Clauſe was never intended, nor ſhall be taken to extend to ſuch Part of the Inteſtate's Eſtate, as any Adminiſtrator, by Virtue only of being Adminiſtrator by Pretence or Reaſon of any Cuſtom, may claim to have been exempt from Diſtribution; but ſuch Part in the Hands of ſuch Adminiſtrator ſhall be ſubject to Diſtribution as in other Caſes within the Act.

5. By the ſame Act the (b) (c) Surpluſage ſhall be diſtributed as follows, *viz.* one Third to the Wife of the Inteſtate, the Reſt by equal Portions among the Children of the Inteſtate, and ſuch as legally repreſent them if any of them be dead, (d) other than ſuch Child or Children (not being Heir) who ſhall have any Eſtate by Settlement of the Inteſtate, or be advanced by him in his Life-time by Portions equal to the Shares of the other Children; and in Caſe any Child, other than the Heir (e) at Law, who ſhall have had an Eſtate by Settlement from the Inteſtate, or be by him advanced in his Life-time by (f) Portion not equal to the Shares of the others, ſhall have ſo much as will make the Eſtate of (g) all equal as near as can be eſtimated; but the Heir ſhall have an equal Part without Conſideration of the Value of the (h) Lands which he hath by Diſcent, or otherwiſe, from the Inteſtate.

(b) Tho' an Eſtate pur auter vie for Want of a ſpecial Occupant, ſhall by 29 Car. 2. cap. 3. go to Executors and Adminiſtrators, and is by the ſaid Statute made Aſſets for Payment of Debts; yet it is not by this Act to be diſtributed. Oldham and Pickering, Carth. 376. And ſaid, that the Eſtate was not changed, but remained a Freehold, with which the Eccleſiaſtical Court had nothing to do. Comb. 388, 389. adjudged, tho' Cheſhire, who argued for the Prohibition againſt his own Opinion, and that of Mr. Finch, wondered the Court gave Judgment ſo ſuddenly; and there is a Note by the Reporter, that probably ſuch Eſtate would be diſtributable in Chancery. Salk. 464. S. C. adjudged. (c) Where an expreſs Legacy is given to an Executor for his Care, and there is no Diſpoſition of the Surplus, the Executor as to that is but a Truſtee, and it muſt be divided as if the Teſtator had died Inteſtate. 1 Vern. 473. 2 Vern. 140, 361, 648, 649, 675, 736, and vide 5 Mod. 247. —— So if the Executor dies before Probate, and there is no Diſpoſition of the Surplus. 2 Vern. 634. (d) Fitzg. 285. (e) Whether the youngeſt Son that hath Borough Engliſh Lands deſcended to him be an Heir within theſe Words. Vide Fitzg. 286. (f) Where a Proviſion for raiſing Money out of Land for younger Children, ſhall be an Advancement, or not. Fitzg. 285, 286. (g) So that what is brought into Hotchpot ſhall not go into the whole Eſtate, but only into the Share belonging to the Children, and not to augment either the Widows or Legatory Part. 2 Vern. 274. (h) But where intitled to 500 l. by Virtue of a Covenant in his Father's Marriage Settlement, if he will have a Share of his Perſonal Eſtate, he muſt bring this into Hotchpot. Phiney and Phiney, 2 Vern. 638. and vide Fitzg. 285.

6. But if there be no Children or legal Repreſentatives of them, the Wife ſhall have a Moiety, and the Reſt be diſtributed equally to the next (i) (k) of Kin of the Inteſtate in equal Degree, and their Repreſentatives.

(i) Brothers and Siſters of the Half-blood in equal Degree with thoſe of the whole Blood, and the Diſtribution made accordingly. Smith and Tracy, 2 Jon. 93. adjudged, 2 Lev. 173. adjudged, 1 Vent. 307, 316, 323. adjudged, 3 Keb. 669. &c. 1 Mod. 209. adjudged, 2 Mod. 204, 205. adjudged, Brown and Brown, Comb. 112. adjudged, Carth. 51, 52. adjudged, and where it had been ſaid in ſome Books, that one of the Half-blood ſhould not have a full Share, but only a Moiety, it hath been exploded as a Fancy. 1 Show. 1, 2. adjudged, and it was ſo ſettled in the Caſe of Wats and Crooke, upon an Appeal to the Houſe of Lords, Caſes in Parliament 108. which vide there, with the Arguments and ſeveral Authorities there cited, 2 Vent. 317. 2 Show. 285, 286. 1 Vern. 404, 437. 2 Vern. 170. 1 Vent. 424. (k) A Man having a Son and two Daughters, one of the Daughters died, and the Father intending to let his Son have the whole Advantage, renounced the Adminiſtration, and it was granted to the Son, and the Siſter after ſued for a Diſtribution, tho' objected ſhe was not intitled at the Death of the Inteſtate. Skin. 103.

7. Provided no Repreſentations ſhall be admitted among Collaterals after (l) Brothers and Siſters Children, and in Caſe there ſhall be no Wife, all ſhall be diſtributed equally among the Children, and if

(l) This is intended of the Brothers and Siſters of the Inteſtate. Raym. 496. Salk. 250. 1 Vern. 169, 233.

(a) If but one Child, such Child shall have the Whole, tho' argued, that the Word Distribute implied more than one; but for this and the Arguments thereon, vide the Case of Palmer and Allicock, Skin. 212, 218. 3 Mod. 58. 2 Show. 407, 486. Comb. 14, 16, 112.

(a) no Child, then to the next of Kin in equal Degree, and their Representatives, as aforesaid.

8. And to the End that due Regard be given to Creditors, no Distribution shall be made till (b) after one Year after the Intestate's Death, and every one to whom any Share shall be allotted, shall give Bond with sufficient Securities in the said Courts, that if any Debts owing by the Intestate shall be after sued for and recovered, or otherwise made appear, he shall refund and pay back to the Administrator his ratable Part of such Debts, and the Costs of Suit and Charges of the Administrator by Reason thereof, to pay Debts so recovered after the Distribution.

(b) Yet the Party intitled hath such an Interest in his Share, that altho' he dies within the Year, yet his Executor or Administrator shall have it. Brown and Brown, Comb. 112. adjudged, Carth. 51, 52. adjudged, 1 Show. 225. adjudged, 1 Vern. 124, 126. and vide the Case of Palmer and Allicock, 3 Mod. 59. Comb. 14, 16. 2 Vern. 274.

9. Yet in all Cases where the Ordinary used to grant Administration *cum testamento annexo*, he shall contiue so to do, and the Will of the Deceased in such Testament expressed shall be performed, as it should if this Act had not been made.

10. By the Statute of 29 *Car.* 2. it is (c) declared, that the said Act of the 22 & 23 *Car.* 2. shall not be construed to extend to the Estates of Feme Coverts that die Intestate, but that their Husbands may demand and have Administration of their Rights, *&c.* and recover and enjoy the same as before the making the said Act.

(c) Whether the Law was not so before, vide 2 Mod. 20, 21. and the Arguments there.

11. By the Statute of 1 *Jac.* 2. *cap.* 17. it is enacted, That if after the Death of the Father any of his Children dies Intestate without Wife or Children, in the Life of the Mother, every Brother and Sister, and the Representatives of them, shall have an equal Share with her.

Administration.

(d) Repeal thereof.

(d) Where it may be without any Sentence of Revocation to be given in any Court Spiritual, or otherwise. 1 And. 303. — As by granting new Administration. Ow. 50. Cro. El. 460. said by Popham in the Case of Watson and Packman, Salk. 38. but vide Cro. El. 315. Style 10, 102. 1 Sid. 409. (e) 1 Sid. 280. S. C. adjudged, but for this and the Books concerning it, vide my Notes upon the Statute 21 H. 8. c. 25. herein before.

1. If an Administration be well granted, according to the Statute, it cannot be repealed without just Cause, as Lunacy, *&c.* of which the Court here will judge, and therefore the Cause ought to be shewed particularly in the Pleadings, and if not, it will be intended for a just Cause. *Hill.* 16 & 17 *Car.* 2. between (e) *Price* and *Parker*, 1 *Lev.* 157. adjudged.

The Effect of such Repeal.

1. If Administration is granted to a Stranger, and after the next of Kin sues a Citation to repeal it, pending which Suit the Administrator to defeat the Plaintiff in the Spiritual Court of the Effect of his Suit, sells the Goods of the Intestate, and after the Administration is revoked by

Sentence, and Adminiſtration granted to the next of Kin, (a) yet the Sale is good againſt the ſecond Adminiſtrator. *Hill.* 37 *El.* between (b) *Wilſon* and *Packman*, 6 *Co.* 18. *b.* adjudged, in Trover brought by the new Adminiſtrator and a (c) Diverſity taken between this Suit by Citation to revoke the former Letters of Adminiſtration, and an Appeal which is always to reverſe a former Sentence, for (d) the Appeal ſuſpends the former Sentence, otherwiſe of a Citation; but ſuch Grant by Covin to defraud Creditors is void by the Statute of the 13 *Eliz.*

(a) For the Adminiſtration was good till repealed. 1 Mod. 231.
(b) Moor 396. pl. 517. S. C. adjudged, Cro. El. 459.
460. S. C. adjudged. (c) For this vide Sims and Sims, Raym. 224. 2 Lev. 90. (d) Goulſ. 119.

2. If one as Adminiſtrator obtains Judgment upon a Bond, and after his Adminiſtration is revoked, he cannot after ſue Execution, for the Adminiſtration being revoked, the Power of the Adminiſtrator is determined, and the (e) Ground of the Suit overthrown. *Hill.* 3 *Jac.* between (f) *Barnhurſt* and Sir *Charles Telverton*, *Telv.* 83. *per totam Curiam*, and Sir *Charles*, after ſuch Revocation, being taken in Execution, was diſcharged *quia erronice emanavit.*

(e) And where the Defendant may in ſuch Caſe be relieved by Audita Querela, vide my firſt Part 636. pl. 19. and the Notes there, and 2 Saund. 149. Lutw. 343. (f) Noy 15. S. C. adjudged, 1 Brownl. 91. S. C. adjudged, and vide Cro. El. 283.

Executorſhip.

(g) Refuſal thereof, and what will amount thereto.

(g) If an Executor take the Oath, tho' after a Caveat entered, he cannot after refuſe. 1 Vent. 335. — So if he once adminiſters, he cannot after renounce, and Adminiſtration after granted is void. 1 Mod. 214. and vide 2 Brownl. 58. 2 And. 150, 151. (h) Such Refuſal muſt be by ſome Act entered in the Spiritual Court, and therefore muſt be done before ſome Judge ſpiritual, and not before Neighbours in the Country. Wentw. Off. of Exec. 54. (i) Broker and Charter S. C. Cro. Eliz. 92. adjudged, and ſaid by Dr. Ford, that by the Civil Law, a Renunciation might be as well by Matter of Fact as judicial Act, and that a Refuſal may be by Parol. Moor 272. pl. 426. and ſaid as before, Ow. 44. adjudged, 2 Brownl. 58, 59. cited, Wentw. Off. of Exec. 54.

1. If all the Executors ſend a Letter to the chief Officer of the Prerogative Court, and thereby inform him, that their Buſineſs is ſo great that they cannot attend the Execution of the Will, deſiring him to grant Adminiſtration, and thereupon an (h) Entry is made in the Court, that *Executores teſtamenti executionem inde ſuper ſe aſſumere diſtulerunt*, *&c.* this is a good Renunciation and Entry thereof. *Mich.* 29 & 30 *Eliz.* (i) Sir *Henry Goodier*'s Caſe, 1 *Leon.* 135. adjudged, and that Adminiſtration thereupon granted was good.

2. If *A.* makes *B.* his Executor, who proves the Will, and *B.* makes *C.* his Executor and dies, *C.* may accept the Executorſhip of *B.* and refuſe to be Executor to *A.* *Mich.* 19 *Jac.* between (k) *Hayton* and *Wolfe*, *Cro. Jac.* 614. *per Curiam.*

(k) Palm. 156. S. C. viz. takes Poſſeſſion of the Goods of B. and waive the Poſſeſſion of the Goods of A.

3. If there be two Executors, and one proves the Will and dies, the other Executor, tho' he never (l) acted or concurred in proving the Will, (m) continues Executor till he makes an actual Renunciation ſo as to intitle the Ordinary to grant Adminiſtration of the remaining Perſonal Eſtate. 19 *Dec.* 1700. in the Caſe of *Houſe*, *&c.* againſt Lord *Petre*, *Salk.* 311. at a Court of Delegates, agreed as well by Civilians as Common Lawyers.

(l) For he might have come in when he pleaſed, and could not renounce during the Life of him that proved it, Salk. 3. Far. 39. (m) Wentw. Off. of Exec. 60. Dyer 160. pl. 42. 9 Co. 37. a.

4. If

4. If there are ſeveral Executors, and one renounces before the Ordinary, and the other proves the Will, yet by the Common Law he that renounced may at any Time come in and adminiſter; and tho' he never acts during the Life of his Companions, yet after their Death he may take upon him the Execution of the Will, in the ſaid Caſe of *Houſe* and Lord *Petre*, *Salk.* 311. held by all the Common Lawyers, tho' the Civilians ſaid by their Law a Renunciation was peremptory.

5. If there be two Executors, and one proves the Will, the Right is in both, and the other cannot refuſe till after the Death of him that proved it, and then he may. *Trin.* 1 *Ann.* between (a) *Brook* and *Stroud*, *Far.* 39. *per Curiam.*

(a) Salk. 3. S. C. and vide Salk. 307, 311. —— And tho' he does refuſe he may after adminiſter at his Pleaſure. 9 Co. 37. a. and for this vide 1 And. 127. Kelw. 207. b. N. Bendl. 15. pl. 18. 2 Brownl. 58. —— But if all the Executors refuſe, and thereupon Adminiſtration is granted, they cannot after adminiſter or act as Executors. Broker and Carter, Cro. Eliz. 92. Moor 272. pl. 426. 1 Leon. 135. 2 Brownl. 58.

Executors.

Where they ſhall join or be joined in an Action.

(b) 9 Co. 36. a. S. P. 1 Rol. Rep. 176. S. P. and after a Verdict for the Plaintiff Judgment arreſted, it appearing by the Plaintiff's Declaration, that there was another Executor who had refuſed.

1. (b) An Action brought by Executors muſt be not only in the Name of thoſe who proved the Will, but of thoſe alſo who refuſed, for the others having the Cuſtody of the Will, and being privy thereto, muſt bring their Action according to the Will. *Wentw. Off. of Exec.* 60.

(c) Diverſity where Executors are Plaintiffs, and where Defendants. 1 Sid. 242.

2. (c) But an Action may be brought againſt thoſe Executors only who proved the Will or adminiſtred, for the Plaintiff is not bound to take Notice of more. *Wentw. Off. of Exec.* 60.

(d) Smith and Smith S. P. adjudged, Yelv. 130. 1 Brownl. 101. tho' Adminiſtration durante minoritate of, &c. was granted to the other Executor, and vide the Caſe of Hatton and Maſcal, which ſeems contra 1 Lev. 181. 1 Keb. 750. and cited in moſt of the Books in which this Caſe of Foxwith and Tremain is reported, and vide my firſt Part 604. pl. 3. and the Notes there. (e) 1 Mod. 47, 72, 296. S. C. 1 Vent. 102, 103. S. C. 1 Sid. 449. S. C. Raym. 198. S. C. 2 Keb. 537, &c. S. C.

3. (d) If any of the Executors are under the Age of Seventeen, yet they ought to join in the Action with thoſe that are of full Age. *Mich.* 22 *Car.* 2. between (e) *Foxwiſt* and *Tremain*, 2 *Saund.* 212. adjudged.

Pleading in Actions by and againſt Executors.

Replication, Rejoinder, &c.

1. If an Executor pleads ſeveral Judgments, and avers they were for true and juſt Debts, the Plaintiff may reply to each ſeverally, that it was obtained by Fraud, and traverſe that it was for a juſt Debt. *Hill.* 21 & 22 *Car.* 2. between (a) *Trethewy* and *Ackland*, 2 *Saund.* 48, 49. adjudged upon a ſpecial Demurrer for the Duplicity; and by the Reporter ſaid, this was an anomalous Caſe againſt the Rules of Law, which condemn double Pleading, but ſaid in this Caſe it had been ſeveral Times allowed.

(a) Jeffrys and Dee, 1 Lev. 281. ſeems to be S. C. and held the Plaintiff might traverſe one or all, and that ſo were the Precedents. 2 Keb. 591. and vide 2 Mod. 36. Beak and Kent, 4 Mod. 63. Carth. 195, 196. —— 1 Mod. 33. it was ſaid by Twiſden, that the Plaintiff may reply to every one of them, or ſay Separalia judicia, &c. obtent' per fraudem, and if ſeparalia judicia, &c. and one is found to be for a true Debt, the Plaintiff is gone. But vide 4 Mod. 54. Carth. 195, 196.

2. If an Executor pleads ſeveral Judgments, and that he hath not Aſſets *ultra*, and the Plaintiff replies they are kept on Foot by Fraud, and the Defendant rejoins they are not kept on Foot by Fraud, *&c.* but doth not ſay, or any of them, the Rejoinder is naught, for there is a Negative pregnant. *Paſch.* 23 *Car.* 2. between *Warcup* and *Symonds*, *Cart.* 221. adjudged *per totam Curiam.*

3. In Debt againſt an Executor, he pleaded a Judgment obtained againſt him, *ultra quod* he had no Aſſets, and the Plaintiff replied, that the Defendant compounded for 20 *l.* which he paid in Satisfaction of the Judgment, and (b) yet kept it on Foot to defraud Creditors, *&c.* and the Defendant rejoins and traverſed the Compoſition. *Hill.* 1 *Car.* 1. between *Veal* and *Gateſden*, 1 *Jon.* 91. adjudged upon a ſpecial Demurrer *per totam & plenam Curiam*, that he ought to have traverſed the Covin and not the Compoſition.

(b) For ſuch Replication, &c. vide 8 Co. 132. b. 133. a. 9 Co. 109. a. 1 Brownl. 40. 1 Lev. 281. —— Where recovered, it is Evidence of Fraud; but if the Executor had not Aſſets to pay that Sum, it is no Fraud. Salk. 312.

Bridg. 80. Latch 111. 2 Saund. 49. 1 Sid. 230. 1 Keb. 808. Vaugh. 104. 1 Mod. 35. 4 Mod. 63. 2 Mod. 36. Hancock and Proud, 1 Saund. 336. 1 Sid. 429. 2 Keb. 533, &c. Iſſue is taken on the Fraud, and it appears the Debtee was willing to take leſs than

4. If an Adminiſtrator pleads a Judgment againſt his Inteſtate, and that he hath not Aſſets *ultra*, *&c.* and the Plaintiff replies, that an Action was brought againſt the Inteſtate, but that he died before Judgment, and that after his Death Judgment was obtained and kept on Foot *per fraudem*, and the Defendant traverſes the Fraud, but anſwers not the Death of the Inteſtate. *Trin.* 30 *Car.* 2. *Randal*, and his Wife's Caſe, 2 *Mod.* 308. adjudged upon Demurrer, that the Judgment may be avoided by (c) Plea, becauſe not Party or Privy ſo as to bring Error, eſpecially in this Caſe, where it is not only erroneous, but void.

(c) Ante Title Error 1. pl. 4, 5. vide, with the Notes there.

5. If an Executor pleads ſeveral Judgments, and that he hath not Aſſets *ultra* 10 *s.* which is not ſufficient to ſatisfy them; the Plaintiff *Proteſtando*, that all the Judgments are kept on Foot by Fraud, may reply, that upon the Day of the Writ there was but 100 *l.* due on all the Judgments, and that the Defendant then had Aſſets to ſatisfy the Judgments

and Plaintiff's Debt alſo. *Trin.* 3 *Will. & Mar.* between (a) *Knighton* and *Moreton*, 3 *Lev.* 311. adjudged upon Demurrer, that ſuch general Pleading of Aſſets ſufficient to pay all the Judgments and Plaintiff's Debt, was good.

(a) 1 Lutw. 450. S. C. cited in a like Caſe.

6. An Executor pleads ſeveral Judgments againſt him obtained on ſeveral Bonds, and that he hath not Aſſets *ultra*, *&c.* and as to one of the Bonds the Plaintiff replies, it was for 200 *l.* conditioned to pay 100 *l.* and ſo to the Reſt ſeverally, and that the Defendant hath Aſſets to pay the Plaintiff and ſatisfy thoſe leſſer Sums; and the Defendant rejoins, that he hath not Aſſets *ultra*, what will ſatisfy the Debts and Judgments in his Plea mentioned. *Trin.* 5 *Will. & Mar.* between (b) *Tompſon* and *Hunt*, 3 *Lev.* 368. adjudged upon a ſpecial Demurrer, that the Rejoinder was good; and tho' it was objected, that he ought to have rejoined only, that he had not Aſſets beyond what would pay the leſſer Sums, and not have made the Penalties Part of the Iſſue; yet it was reſolved by the whole Court to be good, for the Penalties are legal and due Debts till paid, under which he might defend himſelf againſt other Actions; for tho' in Equity the leſſer Sums are only due, yet perhaps the Plaintiffs in them (c) would not accept the leſſer Sums in Satisfaction without a Suit in Equity, and if they would, or offered to accept the leſſer Sums, the Plaintiff might have ſhewed it, and that the Defendant would not pay them, but kept the Judgments on Foot by Fraud.

(b) 1 Lutw. 450. S. C. cited in a like Caſe.

(c) But Q. ſince the Statute of 4 & 5 Ann. c. 16. by which the Defendant was enabled to bring Principal and Intereſt into Court.

Pleadings.

By and againſt Executors.

Where a (d) Traverſe neceſſary.

1. If one as (e) Adminiſtrator of *A.* brings an Action upon a Bond made by the Defendant to *A.* and the Defendant pleads, that *A.* made his Will, and the Defendant Executor thereof, who hath adminiſtred ſeveral of the Goods of *A.* this is not a good Plea, without a Traverſe, that *A.* died Inteſtate. *Mich.* 5 *Jac.* between (f) *Lathbury* and his Wife againſt *Humfry*. *Telv.* 115. adjudged *per totam Curiam* without Argument.

(d) Where a Traverſe in like Caſes, or not. 2 Mod. 168. 2 Vent. 179. Lutw. 891.

(e) Where brought as Executor of A. and the Defendant ſays, A. died Inteſtate, &c. vide Parry and Parry, 3 Bulſt. 250. 1 Rol. Rep. 295.

(f) 1 Brownl. 97. S. C. adjudged.

2. In Debt againſt one as Executrix of her Husband, ſhe may plead he died Inteſtate, and that Adminiſtration was committed to her, by Virtue whereof ſhe adminiſtred; and this is good without any Traverſe, that ſhe is Executrix, or adminiſtred as ſuch. *Mich.* 7 *Will.* 3. (g) *Bowers* and *Cook*, 5 *Mod.* 136, 145. adjudged upon Demurrer to the Plea, becauſe a wrongful Adminiſtration ſhall not be intended; and if any, it (h) might have been ſhewed by the Plaintiff in his Replication; and tho' in *Telv.* 115. it is ſaid there ſhould be a Traverſe, yet all the Precedents and Reaſon of the Thing are to the contrary.

(g) Salk. 297, 298. S. C.

(h) 2 Mod. 168.

3. But if one ſued as Adminiſtrator pleads there was a Will, he ought to traverſe the dying Inteſtate. *Mich.* 7 *Will.* 3. in the Caſe of *Bower* and *Cook*, 5 *Mod.* 145. *per Curiam.*

Extinguiſhment.

(A) What ſhall extinguiſh by the Conjunction of the Eſtates.

1. IF the Conuſee of a Statute hath the Lands of the Conuſor in Extent, and after it is extended upon an Elegit ſued againſt the Conuſee, and the Tenant by Elegit grants his Eſtate to the firſt Conuſor, who is Tenant of the Freehold, this ſhall not extinguiſh the Extent upon the Elegit, for there is in Nature of a Reverſion in the Conuſee; for it is to be intended, that it is not extended for all the Years, for which the Conuſee had his Extent. (a) 31 Aſſ. 6.

(a) Br. Aſſiſe 318. S. C. Br. Extinguiſhment 61. S. C.

2. If a Copyholder of a Manor hath had Time out of Mind, &c. a Way over the Land of another Copyholder, and he purchaſes the Inheritance of his Copyhold, by which the Copyhold is extinct, yet the Way is not extinct thereby. Paſch. 40 El. B. R. between Emſon and Williamſon.

3. If Tenant for Life, and a Stranger purchaſe the Reverſion, this extinguiſhes the Eſtate for Life, for a Moiety, and ſevers the Jointure. Co. 2. Wiſecot 61. (b) 39 H. 6. 2. b.

(b) Co. Lit. 182. b. S. C. cited, Lutw. 1173.

4. So if one Jointenant for Life purchaſes the Reverſion in Fee, * this extinguiſhes the Eſtate for Life for one Moiety, and ſevers the Jointure. Co. 2. (c) Wiſecot 60. b. reſolved contra D. 18 H. 8. 12. b. (d) 7 H. 6. 2. b. 3.

* Fol. 934.

(c) Childs and Weſcot

S. C. Cro. El. 470, 481. and vide Lutw. 1173.

(d) 2 Co. 61. S. C. cited, and ſaid the Doubt well reſolved.

5. So in the ſaid Caſe, if the Fee deſcends to one of the Leſſees for Life, this extinguiſhes one Moiety, and ſevers the Jointure. Co. 2. Wiſcot 60. b. reſolved.

6. If a Rent be granted to the Tenant of the Land, and a Stranger in Fee; this is extinguiſhed for a Moiety, becauſe he hath as high an Eſtate in one, as in the other, and ſo the Jointure ſevered. Com. Bracebridge 419.

7. If Leſſee for Life grants his Eſtate to the Leſſor and a Stranger, this is extinguiſhed for a Moiety, and the Jointure ſevered. Co. 2. Wiſcot 61.

8. If the Tenant enfeoffs the Lord and a Stranger, it ſeems this is not extinct in any, for theſe are diſtinct Things. (e) 11 H. 7. 13. dubitatur 7 H. 6. 3.

(e) Br. Extinguiſhment 58. S. C.

9. If Leſſee for Years as Executor, purchaſes the Reverſion, this extinguiſhes the Leaſe for Years, tho' he hath it in another's Right, but this ſhall be Aſſets. Extinguiſhment, Brook 54.

10. (a) If

(a) Lady Plat and Sleep S. P. Cro. Jac. 275. adjudged by all the Judges contra Williams, 1 Bulſt. 118.

10. (a) **If there be Leſſee for Years, the Reverſion to a Feme Covert, and Leſſee grants his Eſtate to the Husband, and after the Wife dies, the Term** (b) **is not extinct, becauſe the Husband had the Eſtates in ſeveral Rights, for the Freehold was in the Wife, and the Husband only ſeiſed in her Right.** Mich. 22 Jac. B. R. **between** (c) Linchden **and** Winſmore, **adjudged upon a Special Verdict.**

adjudged by all except Williams, and ſaid, that if the Husband had Iſſue by her, ſo as to be intitled to be Tenant by the Curteſy, it would have been a greater Doubt. (b) But vide Co. Lit. 338. b. con. (c) 2 Rol. Rep. 472. S. C. adjornatur.

(d) Cro. Jac. 275. S. C. cited, 2 Rol. Rep. 472. S. C. cited.

11. **If a Feme Leſſee for Years marries the Leſſor, yet this does not extinguiſh the Term.** (d) Com. Bracebridge 418. b. Curia.

12. **So if Leſſee for Years grants his Term to the Wife of the Leſſor, yet this does not extinguiſh the Term.** Com. 418. b. Curia.

13. If the Maſter of an Hoſpital (being a ſole Corporation) leaſes for Years Part of the Poſſeſſions of the Hoſpital, and the Leſſee is after made Maſter, the Term is drowned; for a Man cannot have a Term for Years in his own Right, and a Freehold *in auter droit* to conſiſt together. *Co. Lit.* 338. *b.*

(e) Dal. 52. 4 Leon. 38. Downing and Seymore, Cro. El. 912. Moor 171. pl. 304. 3 Leon. 110. Hob. 3. Ow. 56. Moor 54. pl. 157. Godb. 2.

14. But (e) a Man may have a Freehold in his own Right, and a Term *in auter droit*, and therefore if the Leſſor takes Leſſee to Wife, the Term is not drowned, but he is poſſeſſed thereof in her Right during the Coverture. *Co. Lit.* 338. *b.*

15. So if Leſſee makes Leſſor Executor, the Term is not drowned. *Co. Lit.* 338. *b.*

16. If there be Lord, Meſne, Meſne and Tenant, and the firſt Meſne dies without Heir, (f) ſo that the Meſnalty eſcheats to the ſecond Meſne, or that it comes to him by Grant of the firſt Meſne, that Meſnalty which was neareſt the Tenancy, drowns the more remote Meſnalty. 2 *Inſt.* 502.

(f) Where Tenancy and Meſnalty, &c. extinct by coming into one Hand. Co. Lit. 152. b. Savil 21. 1 Jon. 233, 234.

17. Where the Eſtate for Life, and Fee is limited by one Conveyance, as if made to Three, and the Heirs of one of them, the Eſtate for Life is merged in no Part, but the Jointure continues, being by one Conveyance. (g) *Wiſcot*'s Caſe, 2 *Co.* 60. *b.*

(g) Childs and Weſcot, Cro. Eliz. 470. per Curiam, Co. Lit. 182. a. b. S. P. and vide 2 Saund. 387.

(h) Goulſ. 92. S. P. per Curiam.

18. (h) If a Mortgage in Fee be made to Leſſee for Years, tho' the Money is paid at the Day appointed for Payment thereof, yet the Leaſe is not revived, but utterly extinct. *Mich.* 4 *El.* 3 *Leon.* 6.

19. If a Termor deviſes to his Wife, and if ſhe marries or dies, to her Son, and after the Death of her Husband ſhe enters, and the Reverſioner infeoffs her, and ſhe after marries, the Son may enter, for the Term is not merged. *Trin.* 28 *Eliz.* between (i) *Rudyard* and *Hannington*, 1 *And.* 162. adjudged.

(i) 1 Leon. 92. S. C. Ow. 6. S. C. Goulſ. 59. S. C. My ſecond Part 51. pl. 20. S. C. which vide with the Notes there.

20. If Leſſee for ten Years grants a Rent-charge for theſe Years to his Leſſor, and the Leſſor after grants his Reverſion in Fee to the Leſſee, the Rent is extinct, becauſe the Leſſor who had it was Party to the De-

ſtruction of the Leaſe, which was the Ground of the Rent. 31 *Eliz.* (a) *Buckhurſt*'s Caſe, *Godb.* 137. *per totam Curiam.*

(a) 4 Leon. 2. S. C.

(B) By Act in Law.

1. IF A. and B. are bound in an Obligation jointly and ſeverally to C. and after A. makes D. his Executor, and dies, and D. takes upon him the Execution of the Will, and fully adminiſters all the Goods of A. and after the Obligee makes the ſame D. his Executor, and dies, and whether this extinguiſhed the Obligation as to B. is the Queſtion. Hill. 9 Car. B. R. between (b) Dorcheſter and Webbe, it was a Doubt, and argued upon a Demurrer at Bar; and the Court ſeemed to be of different Opinions, and ſaid it was a good Queſtion. Intratur Mich. 9 Car. Rot. 373. But Trin. 10 Car. it was adjudged to be no Extinguiſhment, but the Plaintiff had Judgment to recover againſt B. becauſe he had it in another Right. In the ſaid Caſe another Matter was, that A. made D. and C. his Executors, and that C. refuſed the Adminiſtration, and died within a Month after, and made (as before is put) D. his Executor alſo; and per Curiam, the making C. Executor, (c) and he refuſing to adminiſter, does not extinguiſh the Debt.

(b) Cro. Car. 372. S. C. adjudged, 1 Jon. 345. S. C. adjudged, Hutt. 128. S. C. cited, Salk. 305. S. C. cited, and ſaid by **Holt**, that when he had no Aſſets, he was not the Perſon to pay,

otherwiſe if he had Aſſets, and then it would have been an Extinguiſhment, and **vide Cook** and **Croſs**, 2 Lev. 73. 3 Keb. 116. (c) **Vide** the Argument, &c. in the Caſe of **Wangford** and **Wangford**, Salk. 300, 301.

2. If the Obligee dies Inteſtate, and Adminiſtration of the Goods of the Obligee, is by the Ordinary granted to the Obligor, (d) yet this does not extinguiſh the Debt, but the Debt remains notwithſtanding this. Co. 8. (e) Sir John Needham 136. reſolved.

(d) 1 Leon. 90. 2 Mod. 315. (e) Salk. 306. S. C. cited, and ſaid, becauſe the Adminiſtration was an Act in Law; but it was ſaid by **Holt**, that if an Adminiſtrator, having no Aſſets, pays a Debt of the Inteſtate to the Value of the Bond out of his own Money, that will be a Releaſe.

3. (f) If the Obligee makes the Obligor his Executor, (g) this is a Releaſe and Extinguiſhment of the Debt. Co. 8. Sir John Needham 136. Com. Woodward 184.

(f) Salk. 305. S.P. **per Holt** Ch. Juſt. becauſe by being made Executor, he is the Perſon intitled to receive, and he alſo is the Perſon that is to pay. (g) Yet it ſhall be Aſſets, for which **vide ante** 1 Rol. Abr. 920. pl. 12, 13. which **vide** with the Notes there, Salk. 302, 303.

4. If a Feme Obligee takes the Obligor, or one of the Obligors to Huſband, this is an Extinguiſhment of the Debt. Co. 8. (h) Sir John Needham 136.

(h) Salk. 303. S. C. cited.

5. (i) If a Woman Executrix of the Obligee takes the Debtor to Huſband, this is no Releaſe in Law, becauſe ſhe hath the Debt in another Right, and if this amounted to a Releaſe in Law, it would be a Devaſtavit, * which is a Wrong that the Law will not ſuffer. Co. 8. Sir John Needham 136. cited, Mich. 30, 31 El. B. R. adjudged.

(i) Co. Lit. 264. b. S. P. **Croſman** and * Fol. 935. **Read** S. P. Cro. Eliz. 114. adjudged, that it was ſuſpended, but not extinguiſhed, for that after the Huſband's Death an Action would lie againſt his Executor. Moor 236. pl. 368. 1 Leon. 320. but **vide** Wentw. Off. of Exec. 25. Goulſ. 181. pl. 117.

6. If A. and B. are bound in an Obligation jointly and ſeverally to C. and C. makes D. the Wife of A. his Executrix, and dies,

and D. adminiſters, and after A. the Husband of D. makes D. his Executrix, and dies leaving ſufficient Aſſets to pay the Debt, and after D. dies, and E. takes Adminiſtration of the Goods of C. the Obligee not adminiſtred, yet he can have no Action upon the Obligation againſt B. the other Obligor, becauſe that when the Obligor made the Executrix of the Obligee his Executrix, and left Aſſets, the Debt was preſently ſatisfied by Way of Retainer, and then by Conſequence no new Action could be had for the Debt. Hobart's Reports between (a) Fryer and Gildridge 14. adjudged. Intratur Hill. 11 Jac. B. Rot. 1990.

(a) Hob. fol. 10. S. C. Moor 855. pl. 1174. S. C. 1 Jon. 345. S. C. cited, Hut. 128. Poſt M. 2, 3. S. C.

7. If A. promiſes B. a Woman, that if ſhe will marry him, he will leave her worth 100l. at his Death, and after they intermarry, yet this does not diſcharge the Promiſe, which is to be performed after this is ended. Hobart's Reports, Caſe 279. between (b) Smith and Stafford.

(b) Hob. fol. 216. S. C. adjudged, Hob. diſſenting, 1 Brownl. 18, 19. S. C. adjudged by three Judges againſt one, Noy 26. S. C. and ſaid to be compounded in Court, my firſt Part 703. pl. 10. which vide, and the Notes there.

8. If the Obligor makes the Obligee his Executor, (c) this is a Releaſe of the Action, tho' the Duty remains, for that the Executor (d) may retain ſo much of the Goods of the Teſtator to ſatisfy himſelf. *Co. Lit.* 264. *b.*

(c) Not unleſs there be Aſſets, which he may retain, for otherwiſe the Action is not ſo much as ſuſpended, for the Executor may ſue the Heir at the Day. Salk. 304. per Powel Juſtice. (d) Ante 1 Rol. Abr. 920, 921. pl. 12, 13.

9. If the Obligee makes the Obligor his Executor, who adminiſters ſeveral Goods, but dies before Probate, yet this is a Releaſe. *Mich.* 11 *Will.* 3. between *Wangford* and *Wangford*, *Salk.* 299, 300, *&c.* adjudged *per totam Curiam* by Reaſon of the Adminiſtration, tho' it would have been doubtful if there had been no Adminiſtration, as appears by the Arguments of the ſeveral Judges there.

(C) In what Caſes there ſhall be an Extinguiſhment by Unity of Poſſeſſion.

By the Act of the Parties.

1. (e) If the Tenant enfeoffs the Lord and two others, this ſhall not extinguiſh the Seigniory; for it ſhall revive if the others ſurvive. (f) 7 H. 6. 3.

(e) Sutton and Robertſon S. P. Moor 56. pl. 161. Ow. 31. Dal. 60. —— 1 And. 83. like Point, where the Grantee of a Rent-charge, and others, were infeoffed, *&c.* (f) Br. Extinguiſhment 17. S. C. but this Point otherwiſe.

2. So if Leſſee for Life grants his Eſtate to the Leſſor, and two others (admitting it is not a Surrender for a third Part, as Wiſecot's Caſe, Co. 2. is) if the others ſurvive the Leſſor, the Rent ſhall be revived, and therefore not extinguiſhed. (g) 7 H. 6. 2. b.

(g) Br. Surrender 11. S. C. Rent revive 1.

3. If he, that hath Common appendant, (a) purchaſes the Land out of which it iſſues in Fee, the Common is extinct by this. 7 H. 6. 3. 18 E. 3. 30. b. 24 E. 3. 25. per Wilby dubitatur. 20 E. 3. Admeaſurement 8.

(a) Where in Caſe he purchaſes Part of the Land in which, &c.

the Common ſhall be apportioned, or not, vide my firſt Part 507. pl. 20, 21. which vide with the Notes there. Goulſ. 114. —— Where Unity of Poſſeſſion of the Lands to which and in which extinguiſhes or ſuſpends the Common. 4 Co. 38. a. 3 Leon. 128. Bradſhaw and Eyre, Cro. Eliz. 570. Moor 462. pl. 651. Worlidge and Kingſwall, Cro. Eliz. 794. 2 And. 168. Godb. 4. Poph. 166. Ow. 122. My firſt Part 801. pl. 8. My ſecond Part 202. pl. 5, 6. 2 Sid. 111. 2 Mod. 277. —— Where revived when ſeparate again. Godb. 4.

4. Vide 5 Aſſ. 8. That the Lord may have Common in his own Waſte appendant to certain Land.

5. If he that hath Common in Groſs purchaſes the Land out of which it iſſues, the Common is extinguiſhed. 7 H. 6. 3.

6. Shack Common or mutual Common, in regard that I have Common in your Ground, you have in my Lands, ſhall not be extinguiſhed by Unity of Poſſeſſion, for the Neceſſity of the Publick Good to uſe without Incloſure. Paſch. 12 Jac. B. the Biſhop of London's Caſe, per Curiam.

7. If the Manor of S. be within the Purlieu of the Chaſe of D. and after the King comes to both, this Unity of Poſſeſſion of the Chaſe and Manor does not extinguiſh the Liberty of Hunting in S. as a Purlieu. (b) D. 17 El. 327, 3.

(b) Poph. 167. S. C. cited.

8. Unity of Poſſeſſion of the Land to which a Way is appurtenant by Preſcription, and of the Land over which the Way is, will extinguiſh the Way, for the Preſcription is gone, and the Way is againſt common Right. Hill. 4 Jac. B. R. between (c) Jordan and Atwood, adjudged by Three againſt Two. Contra 11 H. 7. 25. b. per Vaviſor.

(c) Ow. 121, 122. S. C. and ſaid it was adjudged

againſt the Plaintiff, and that the Way was not extinguiſhed. 2 Sid. 111. S. C. cited, and ſaid, the Roll of the ſaid Caſe being brought into Court, it appeared Judgment was for the Plaintiff, and ſo the Caſe miſ-reported by Owen, N. Dyer 295. b. Margin S. C. cited, and vide Bro. Extinguiſhment 13. 4 Mod. 363.

9. Unity of Poſſeſſion of the Mill and Pool, to which a Way is appendant with the Land over which the Way lies, will extinguiſh the Way. 21 E. 3. 2. b. 21 Aſſ. pl. 1. admit, 19 E. 3. Nuſans 3. admit, for there upon a Partition between the Daughters, the Mill and Way were aſſigned to one, and it was as a new Grant. Contra 20 E. 3. Admeaſurement 8. (d) 11 H. 4. 5.

Fol. 936.

(d) Br. Extinguiſhment 11. S. C. Fitz. Extienſement 4. S. C.

10. If a Mill hath a Way to a Church, and one of the Mill purchaſes the Land over which, &c. and after aliens it; yet this Unity did not extinguiſh his Way, becauſe it is a Thing of Neceſſity. Hill. 4 Jac. B. R. in Jordan and Atwood's Caſe agreed.

11. If the Cuſtom of London be, that where there are two Tenements adjoining, and one hath a Gutter running thro' the Tenement of the other that he cannot ſtop it, Unity of Poſſeſſion will not extinguiſh this Cuſtom, but that it ſhall be revived after they are ſevered, for the Cuſtom of London extends to all Gutters that are in the Land of another, and ſo the Cuſtom is revived. 11 H. 7. 25. b. H. 4 Jac. B. R. in Jordan and Atwood's Caſe agreed.

12. (e) If he that hath White-acre ought by Preſcription to incloſe againſt Black-acre; Unity of Poſſeſſion of both by Purchaſe, will not extinguiſh this Preſcription. Paſch. 7 Jac. B. between Ingram and Bartlet, by Three againſt one.

(e) For this vide Dyer 295. b. Lat. 154. Poph. 166, 167, 168.

2 Sid. 39. Polus and Henſtock S. P. 1 Vent. 97. adjudged, Raym. 192. Twisden ſaid, that the Point had been determined both Ways. 2 Keb. 686, 707.

13. If

13. If there have uſed Time out of Mind, &c. a Water-courſe to run from a River over a Cloſe called the Hop-yard, to a Watering-place for the Watering the Cattle of the Occupiers of a Rectory, and other Neceſſaries of the ſaid Occupiers; and after there is an Unity of Poſſeſſion in Fee of the Place from which, and of the Hop-yard over which, and of the Rectory and Watering-place to which, in King H. 8. and after by him ſevered again; this Watering-place ſhall revive, becauſe it is of Neceſſity, and alſo the Watercourſe is natural. Mich. 2 Car. between (a) Sury Plaintiff, and Piggot and others Defendants, adjudged upon Demurrer.

(a) 1 Jon. 145. S. C. adjudged per totam Curiam, and ſaid, that notwithſtanding the Unity the Water run, &c. Latch 153, 154. S. C. adjudged, Noy 84. S. C. adjudged, Poph. 166. S. C. adjudged, with long Arguments and many Caſes cited, 3 Bulſt. 339, 340. S. C. adjudged by the whole Court, and many Caſes cited in the Arguments. N. Dyer 295. b. Margine S. C. cited 41.

14. If there be three Coparceners of a Manor, to which a Leet belongs, and the King purchaſes two Parts of the Manor with the Appurtenances, this Leet is not extinct, but remains appendant to the third Part of the Manor. (b) *Hill.* 28 *H.* 8. 1 *And.* 26. held ſo by all the Judges of the Common Pleas, but in the Book there is a *Quære le intent*, for at leaſt the King holds the Leet with the third Coparcener, and ſhe hath not the Leet in her by the Alienation of the two Siſters.

(b) N. Bendl. 20. pl. 30. S.C. and S.P. per Curiam, and no ſuch Quære made.

15. Tithes are an Eccleſiaſtical Inheritance collateral to the Eſtate of the Land, and therefore (c) no Unity of Poſſeſſion will either extinguiſh or ſuſpend them. 11 *Co.* 13. *b.*

(c) For this vide Benton and Trot, Moor 528, 529, &c. pl. 699. Savil 62, 63. Dav. 6, 7. 1 Leon. 248. My firſt Part 582, vide Margin, and my Notes there. Biſhop of Lincoln and Cooper, 1 Leon. 248. Cro. El. 216. Dal. 49.

16. Where a Lord of a Manor had Common for himſelf, and his Copyhold Tenants of Inheritance in the King's Waſte, in a Foreſt, and in the Waſte of other Freeholders, and the Manor came to the King by the Diſſolution of an Abbey, and the King granted the Manor to *J. S.* the Common in the Lands of the Freeholders was not extinct, but in the Waſte of the King was extinct as to the Lord of the Manor, but (d) not as to the Copyholders. 10 *Car.* at a Juſtice-Seat then held for the Foreſt of *Waltham.* 1 *Jon.* 349. ſo reſolved.

(d) 2 Brownl. 47. My ſecond Part 202. pl. 5.

17. If there be three Parcels of Land, and the only Way is out of the firſt Parcel into the Second, and out of the two firſt Parcels to the Third, and *J. S.* purchaſes all the Parcels, and after by Feoffment aliens the two firſt Parcels, yet he ſhall have the Way to the Third, for that it is abſolutely (e) neceſſary for his Enjoyment of the third Parcel, and ſo not deſtroyed by the Unity of Poſſeſſion. *Hill.* 1657. between *Packer* and *Welſtead*, 2 *Sid.* 39, 111, 112. adjudged *per totam Curiam.*

(e) Diverſity between a Way of Neceſſity and a Way of Eaſe. Poph. 172. Latch 154. Noy 84. 2 Sid. 39. 1 Vent. 97.

18. Where one was ſeiſed in Fee of a Manor, of which one Acre covered with Water was Parcel, and preſcribed to have a neceſſary Eaſement, *viz.* to enter into a Cloſe adjoining, and to ſpread and caſt his Nets there for the neceſſary Catching of Fiſh, *&c.* and whether extinguiſhed by Unity of Poſſeſſion. *Mich.* 6 *Will.* between *Peers* and *Lucy*, *&c.* 4 *Mod.* 362. debated, but no Judgment.

19. All Penſions by the King reſerved or to him granted out of Lands are in Nature of Rents liable to be extinguiſhed by Unity of Poſſeſſion; but ſuch as are reſerved to, or veſted in him by 26 *Hen.* 8. *c.* 3. are of another Nature collateral to the Land, not loſt by Unity. *Mich.* 16 *Car.* 2. between the Biſhop of *Ely* and *Clare Hall* in *Cambridge*. *Hard.* 388. *per Curiam.*

(D) Cuſtoms.

1. IF a Cuſtom be annexed to a Seigniory, there Unity of Poſſeſſion of the Tenancy and Seigniory does not extinguiſh the Cuſtom. (a) 14 H. 4. 8.

(a) Br. Extinguiſhment 14. S. C. Br. Cuſtom 19. S. C.

2. If there be a Cuſtom, that every Tenant of an Honour ſhall pay a Fine for Alienation, if the Lord purchaſes a Tenancy, or hath it by Diſcent or Eſcheat, and after aliens it again, yet the Cuſtom is deſtroyed in this by the Unity of Poſſeſſion. (b) 14 H. 4. 3. adjudged.

(b) Br. Extinguiſhment 14. S. C.

3. And note, this Cuſtom is particular, for tho' this extends to ſeveral Tenants, yet on the Part of the Lord is but as one. 14 H. 4. 7.

4. But if a Cuſtom be general thro' the whole County, there Unity of Poſſeſſion in the Seigniory does not extinguiſh the Cuſtom, tho' it be annexed to the Seigniory. 14 H. 4. 7.

5. But if a Cuſtom be annexed to the Tenancy, there Unity of Poſſeſſion of the Tenancy and Seigniory does not extinguiſh the Cuſtom. (c) 14 H. 4. 8.

(c) Br. Extinguiſhment 14. S. C. Br. Cuſtom 19. S. C.

6. As if the Lord purchaſes Land in Gavelkind or Borough Engliſh of the Tenant, this does not extinguiſh the Cuſtom, becauſe it is annexed to the Tenancy. (d) 14 H. 4. 8. 11 H. 7. 25. b.

(d) Br. Extinguiſhment 14. S. C. Br. Cuſtom 19. S. C. and vide Lat. 154.

7. If A. be ſeiſed in Fee of an Houſe that hath certain Lights by Preſcription, and B. hath another Houſe near adjoining thereto, and B. wrongfully erects a Building upon his own Freehold, which hangs over the Houſe of A. and thereby (e) ſtops his Lights, and after B. purchaſes in Fee the Houſe of A. and after grants or leaſes to C. the Houſe which was the Houſe of A. C. hath no Remedy to abate this Nuſance, for by the Unity of Poſſeſſion the Preſcription for the Lights was extinct, ſo that C. ought to take it in ſuch Plight as it was at the Time of the Grant made to him, for the Unity purged the Wrong, both being in one Hand, who might * do with it at his Pleaſure. Hobart's Reports between (f) Robins and Barns, per Cur', 175.

(e) Where Lights may be ſtopped, or not, vide Palmer and Fletcher, 1 Sid. 167. Ray. 87.

* Fol. 937.

1 Lev. 122. 2 Rol. Abr. 140. pl. 10. with the Notes there.

1 Keb. 553. Cox and Mathews, 1 Vent. 237, 239. 3 Keb. 133. My firſt Part 203. pl. 17.

(f) Hob. fol. 131. S. C. adjudged.

8. So it is if B. after pulls down his Houſe and builds it in the ſame Manner it was before, ſo that he does not make it hang more over than it did hang over at the Time of the Grant made to C. (g) Hobart's Reports 175. per Curiam agreed.

(g) Hob. fol. 131. S. C. Moor 866. pl. 1195. S. C. adjudged.

9. But if he makes it to hang more over than before, an Action lies for C. to remedy it, for it is a new Wrong. Hob. Rep. 175. in the ſaid Caſe of Robins and Barnes.

10. If A. ſeiſed of an Houſe in Fee, in which he hath Lights by Preſcription, and after purchaſes another Houſe in Fee next adjoining, and after grants or leaſes the Houſe that had the Lights

to C. the Preſcription is revived; for it is but an Eaſement running with the Houſe, and therefore not extinct by the Unity. (a) Hob. Rep. 175. dubitatur.

(a) Hob. fol. 131. and a Diverſity taken between Intereſts and Profits, as Rents, Commons, &c. and bare Eaſements, as Lights, Air, Gutters, &c. for tho' while in one Hand, they may be ſtopped, becauſe a Man cannot be ſaid to wrong himſelf; yet if divided they revive, but if ſtopped, &c. while in one Hand, tho' after in ſeveral, they cannot be reſtored, but muſt be taken as at the Time of the Conveyance.

(E) Acts in Law.

1. IF Lands deſcend to two Coparceners out of which one hath a Rent-charge iſſuing, this does not extinguiſh the Rent, but only ſuſpends it, (b) for after Partition (b) it ſhall revive. (c) 7 H. 6. 3.

(b) For a Moiety being apportioned, my firſt Part 507. pl. 4, 5.

(c) Br. Extinguiſhment 17. S. C.

(d) Br. Extinguiſhment 17. S. C.

2. So if Lands deſcend to two Coparceners, of which one hath the Seigniory; this does not extinguiſh the Seigniory. (d) 7 H. 6. 4.

3. If the Meſne takes the Tenant to Wife, this ſhall not extinguiſh the Meſnalty, but only ſuſpend it. 7 H. 6. 3. b.

4. But if the Meſne and Tenant intermarry, and have Iſſue, and the Meſnalty and Tenancy deſcend to the Iſſue, this extinguiſhes the Meſnalty, and it ſhall not be revived after, tho' the Iſſue dies without Iſſue, by which the Meſnalty ought to go to the Heir of the Part of the Father, and the Tenancy to the Heir of the Part of the Mother; for this was not intended at the Time of the Conjunction of the Eſtates. 7 H. 6. 3. b. dubitatur.

5. If the Remainder in Fee upon an Eſtate for Life eſcheats, the Seigniory is extinct; for the Fee-ſimple of the Seigniory being extinct, there can be no particular Eſtate for Life thereof in Reſpect of the Tenure and Attendance over. *Co. Lit.* 312. *b.*

(e) For this Diverſity, vide Cro. El. 226. 1 Leon. 255.

6. (e) Otherwiſe of a Rent-charge, for if that be granted for Life, and after he in Reverſion purchaſes the Land, ſo that the Reverſion of the Rent-charge is extinct; yet the Grantee for Life ſhall enjoy the Rent during his Life, for there is no Tenure or Attendance in this Caſe. *Co. Lit.* 312. *b.*

(F) What Things ſhall be extinct by a (f) Feoffment or other Act of the Party.

(f) Where by a Feoffment or Fine all Rights, as well future as preſent, ſhall be extinct. 1 Co. 111. a. b. Goulſ. 107. Co. Lit. 30. b. Godb. 301. 4 Leon. 135, 221. 6 Co. 70. a.

1. IF the Lord enfeoffs the Tenant of the Land after quia emptores, (admitting it may be, but Quære how it may be, the Tenant being in Poſſeſſion) this extinguiſhes the Seigniory. 3 H. 6. 43. b. admitted. 17 E. 3. 32. 22 E. 3. 18. b. Curia, 39 E. 3. 20. b.

—— Where a Right to a Writ of Error is extinguiſhed by a Feoffment of the Lands. Ante Title Error 85. pl. 10. —— Where Conditions, &c. are extinct by Fine or Feoffment made for further Aſſurance. Andrews and Blunt, Moor 105. pl. 249. 1 And. 17. Dyer 311. a. b. 1 Co. 174. a. b. 2 Co. 59. b. —— For the violent Operation of a Feoffment, vide my Notes on the Word Feoffment. 2 Rol. Abr. 1.

2. If the Lord of a Manor, who hath de jure Common in his own Waſte, aliens the Waſte, this extinguiſhes his Common. 18 E. 3. 44. (a) 18 Aſſ. pl. 4.

(a) Br. Commoner 22. S. C.

3. If a Man makes a Feoffment of (b) Lands, in which he hath Common appendant, this extinguiſhes the Common for ever. Mich. 9 Jac. B. between Catesby and Wilkinſon, per Curiam.

(b) Where Feoffment but of a Moiety, and it was held the Common ſhould be apportioned. Smith and Wonſal, Goulſ. 117. Moor 463. pl. 654.

4. If a Man poſſeſſed for a Term of Years deviſes it to his Wife for eighteen Years, and after to B. his eldeſt Son for Life, and after to the eldeſt Iſſue Male of B. for Life, and dies, and after the eighteen Years B. enters and is poſſeſſed, and after C. his eldeſt Iſſue Male is born, and after B. makes a Feoffment in Fee of the Lands and dies; this ſhall not deſtroy the Eſtate of C. he being born before the Feoffment. 8 May, 1638, 14 Car. Regis, upon a Reference out of Chancery to Juſtice Jones, Crook and Berkly, between Cotton and Heath, by the ſaid Juſtices reſolved, and ſo certified accordingly, and it was then ſaid, that the Opinion of the Lord Keeper was accordingly, vide Co. 8. 96. b.

5. (c) If the Tenant enfeoffs the Lord and another, by which the Seigniory is ſuſpended, and they re-infeoff the Tenant, or other Perſon, the Seigniory is thereby extinct, for each Jointenant granted the Whole. *Paſch.* 6 *Eliz.* between (d) *Sutton* and *Robertſon*, *Moor* 56. *pl.* 161. adjudged.

(c) Br. Extinguiſhment 58. S. P.

(d) Ow. 31. S. C. Dal. 60. S. C.

6. (e) So if the Tenant enfeoffs the Lord of a Moiety of the Tenancy, and the Lord aliens it, the Seigniory is extinct for a Moiety. *Paſch.* 6 *El. Moor* 56. *pl.* 161. *per Curiam.*

(e) Dal. 60. S. P.

7. If the Lord releaſes his Right in one Acre, this extinguiſhes the whole Seigniory. (f) *Paſch.* 6 *Eliz. Moor* 56. *pl.* 161. *per Curiam.*

(f) Dal. 60. S. C. and S. P. per Curiam, and vide 1 And. 235.

8. If the Lord diſſeiſes the Tenant, and makes a Feoffment in Fee upon Condition, and enters for the Condition broke, yet the Seigniory is extinct, for that was incluſively extinct by the Feoffment. *Co. Lit.* 30. *b.*

9. If the Diſſeiſee levies a Fine to a Stranger, the Diſſeiſor ſhall retain the Land for ever, for the Diſſeiſee againſt his own Fine (g) cannot claim the Land, and the Conuſee cannot enter, for the Right which the Conuſor had could not be transferred to him, but by the Fine is extinguiſhed, of which the Diſſeiſor ſhall take Advantage. 2 *Co.* 56. *a.*

(g) He is eſtopped, but for this vide ante Title Eſtoppel 257. pl. 3. and the Notes there.

(G) Suſpenſion.

Fol. 938.

1. If Leſſor for Years (h) enters (i) on Part of the Land, all the Rent is ſuſpended. 7 H. 6. 26. Curia.

(h) Diverſity where the Entry is by (i) Hob. 190.

Wrong, or not. Wentw. 277.

2. If a Man leaſes for Years rendring Rent, and the Leſſee leaſes it to another at Will, and the firſt Leſſor at the Rent-day enters into Part of the Houſe leaſed by Leave of the Leſſee at Will; yet this does not ſuſpend the Rent. It was adjudged in B. between (k) Darrel and Andrews and Cope, and Paſch. 15 Jac. B. R. it was affirmed and admitted by the Court, and Counſel at the Bar.

(k) Hob. 190. S. C. but S. P. does not appear. 1 Vent. 277. S. C. cited.

3. (a) If

(a) Where upon an Eviction the Rent is diſcharged or not, my ſecond Part 507. Letter C. 2 Rol. Abr. 429. Letter O. which vide and the Notes there. My ſecond Part 92. pl. 18. 1 Leon. 110. Hob. 326. Cro. El. 398. Moor 891. pl. 1254.

3. (a) If a Man leaſes for Years rendring Rent, and the Leſſee leaſes it to another at Will, and the Leſſee at Will licences the firſt Leſſor to enter in Part of the Houſe, and the Leſſor by Force of his Licenſe enters and continues there by the Space of Half an Year, during which Time the Rent-day incurs; yet this does not ſuſpend his Rent, for the Leaſe at Will is not determined by the Licence to enter; for this did not amount to a Leaſe for half an Year, for the Licence was not for any Time certain, but only to enter, and after he continued there by Virtue of this Licence, by Permiſſion for the Time aforeſaid; it was adjudged in Banco, between (b) Darrel againſt Andrews and Cope, and Paſch. 15 Jac. B. R. affirmed, and adjudged per Curiam. Paſch. 16 Jac. B. R. In a new Action between the ſame Parties it was adjudged again upon a Demurrer.

(b) Hob. 190. S. C. but S. P. does not appear. 1 Vent. 277. S. C. cited.

4. If a Commoner encloſes Part of the Waſte in which he hath Common, it ſuſpends his Common. Paſch. 1 Jac. B. Bradſhaw's Caſe adjudged.

5. If a Copyholder leaſes for twenty Years, reſerving 20 *l.* yearly, and the Leſſee leaſes Part for ten Years, reſerving no Rent, and the under Leſſee aſſigns his Term to the firſt Leſſor, there ſhall be no Suſpenſion or Apportionment; but the firſt Leſſor ſhall have his whole Rent of 20 *l.* yearly from his Leſſee, and he nothing from his under Leſſee, having reſerved nothing, and a Suſpenſion is always when the Leſſor enters wrongfully and againſt the Will of the Leſſee; but here all was done by Agreement and Contract of the Parties, and therefore each ſhall enjoy according to their Agreement. *Paſch.* 27 *Car.* 2. between (c) *Hodgſon* and *Thorborough*, 2 *Lev.* 143. adjudged.

(d) 1 Vent. 276. S. C. adjudged per Curiam, 3 Keb. 500, 505, &c. S. C.

(H) What Act ſhall make a Suſpenſion.

1. A Rent-Service cannot be ſuſpended in Part by the Act of the Party, and in eſſe for the other Part. (e) Co. Lit. 184. b.

(e) 2 Lev. 142, 143. this cited, and by Twisden ſaid, that what Coke had ſaid, that a Rent-Service could not be ſuſpended in Part, and in eſſe for Part, was without Reaſon and Authority.

2. If the Land out of which the Rent iſſues deſcends to the Grantee of the Rent and another as Coparceners, till Partition the Rent is ſuſpended as to any Diſtreſs. (f) 34 Aſſ. 15.

(f) Br. Extinguiſhment 31.

3. If there be Tenant in Tail, the Remainder in Tail, and Tenant in Tail grants a Rent in Fee to him in Remainder; this is not any Suſpenſion of the Rent, in as much as it iſſues out of the Freehold. Mich. 15 Jac. B. R. between (g) Dutton and Ingham, adjudged per totam Curiam, and that this may be granted over by him in Remainder.

(f) My firſt Part 780. pl. 1, 2. S. C. which vide with the Notes there.

4. So if there be Tenant in Tail, the Remainder in Tail, and he in Remainder purchaſes a Rent in Fee of J. S. who had it before any of theſe Eſtates created; yet this does not make any Suſpenſion, becauſe he had nothing in the Freehold. Mich. 15 Jac. B. R. in Dutton and Ingham's Caſe, per Houghton.

5. If there be Lord and Tenant of three Acres, by 3 d. Rent, and the Tenant leaſes one Acre to the Lord for Years, it ſuſpends the Seigniory in the Whole, for the Seigniory may be extinct in Part, but not ſuſpended in Part, but for the Intire. Brook Extinguiſhment 48. Co. Lit. 148. b.

6. So if the Tenant leaſes for Life, or gives in Tail to the Lord Part of the Land, it ſuſpends the whole Seigniory. Co. Lit. 148. b.

7. If a Man ſeiſed in Fee leaſes for Years reſerving a Rent, and after acknowledges a Statute to J. S. and another Statute to J. D. and after grants the Reverſion for Years to J. S. and the Leſſee attorns, this ſuſpends the Statute of J. S. by the Acceptance of the Leaſe of the Reverſion ſo long as the Leaſe continues, tho' he grants the Leaſe over to another. Paſch. 16 Jac. B. R. between Sir John Harrington and Garroway adjudged. Trin. 15 Jac. B. R. ſame Caſe adjudged. Fol. 939.

8. If a Parſon leaſes his Rectory to another reſerving a Rent, and after takes the Tithes due, viz. the Lambs, Wool and Grain, this will not ſuſpend his Rent, for it does not iſſue out of the Tithes. 28 E. 3. 94.

9. If a Man leaſes Land for twenty-one Years reſerving Rent, upon Condition to re-enter for Non-payment, and after the Leſſee makes a Leaſe for ſix Years, to begin two Years after, this future Intereſt made to the firſt Leſſor does not ſuſpend his Rent, or the Condition in the mean Time, but that upon Demand of the Rent and Non-payment thereof, he may enter for the Condition broke. Co. 4. Rawlins 53.

10. If a Man makes a Feoffment in Fee upon a collateral Condition, and after the Feoffee redemiſes the Land to the Feoffor, and after the Condition is performed; in this Caſe the Redemiſe was no Suſpenſion of the Condition, and therefore no Impediment, but that the Feoffor ſhould take Advantage of the Condition, and thereby deſtroy the Term which he himſelf had accepted. Co. 1. Shelly 97. Diggs 174. Co. 4. Rawlins 53. 2 Brownl. 228.

(I) Suſpenſion by Act of Law.

1. IF Guardian in Chivalry enters into the Land of his Ward within Age, by this the Seigniory is ſuſpended; but if the Wife of the Tenant be after endowed of the third Part of the Land, now ſhe ſhall pay to the Lord the third Part of the Rent. Co. Lit. 148. 1.

2. So if the Tenant gives Part of the Tenancy to the Father of the Lord in Tail, and after the Father dies, and it deſcends to the Lord; in this Caſe by the Act in Law the Seigniory is ſuſpended in Part, and in eſſe for Part. Co. Lit. 148. 1.

3. The ſame Law is of a Rent-charge. Co. Lit. 148.

(K) Suſpenſion by the Act of GOD, Enemies, &c.

1. IF A. leaſes Land to B. for Years rendring Rent, and before any Rent in arrear, the Enemies of the King and Realm enter into the Realm, and enter into Poſſeſſion of the Land and eject the Leſſee, and continue it till after the Rent-day is paſt, yet this does not ſuſpend the Rent, becauſe it became due by an expreſs Agreement between the Leſſor and Leſſee, and not by Act of Law, for an Action of Covenant lies againſt the Leſſee for the Non-payment of the Rent upon the Reſervation, which is an Agreement between them, and there is no more Reaſon that the Leſſor ſhould ſuſtain the Damage by the Enemies than the Leſſee, in as much as the Leſſee had the full Power of the Land during the Term, and by his own Contract is to pay the Rent upon all Perils. Mich. 23 Car. B. R. between (a) Padine and Jane, adjudged upon a Demurrer in two Caſes. Intratur Hill. 22 Car. Rot. 1178, 1179.

(a) Style 47, 48. S. C. adjudged, the Matter not being well pleaded. All. 26, 27. S. C. adjudged, and a Difference taken where the Law creates a Duty or Charge, and where by the Parties own Contract, and vide my firſt Part 507. pl. 2, 3. My ſecond Part 84. pl. 8, 9.

(L) Suſpenſion of Perſonal Things.

1. IF the Obligee covenants with the Obligor, who is bound to perform Covenants, (b) not to moleſt or ſue him before ſuch a Day; this is no Suſpenſion of the Debt, for the proper Senſe of the Word is to have Covenant thereupon, if he ſues him before the Day, and not to make it a Releaſe. Mich. 37 El. B. between (c) Dowſe and Jeffries, per Curiam.

(b) What Things, and when may be defeaſanced, My ſecond Part 481.

(c) 1 And. 307. S. C. adjudged, Cro. El. 352. S. C. adjudged, and ſaid, if it had been a Covenant not to ſue at all it would have been a Releaſe, and might have been pleaded as ſuch. March 95.

2. If the Obligee grants to the Obligor, that he ſhall not be ſued or vexed upon the ſaid Obligation before ſuch a Day, and if he be, that he ſhall then plead the ſaid Grant as an Acquittance, and that the ſaid Obligation ſhall be void and of no Effect; this is a Suſpenſion of the Obligation, and ſo by Conſequence a Releaſe, for * this is a Grant, and that he ſhall plead it as an Acquittance. (d) 21 H. 7. 23. b. 30.

* Fol. 940.

(d) Bird. 117. S. C. cited, Show. 46. S. C. cited, Br. Defeaſance 16. S. C. Br. Bar 58. S. C. Br. Grant 58. S. C.

3. *A.* having a Rent-charge iſſuing out of three Acres, *B.* purchaſed two Acres thereof, and *A.* covenanted and granted to and with *B.* not to diſtrain in thoſe two Acres for the Rent; by *Glanvil* it was held a Releaſe, but *Anderſon contra*, (e) *Noy* 5. but *per Curiam*, if it be a Releaſe the Tenant of the other Acre may plead it, for thereby the Rent was extinct.

(e) 1 Shor. 321. S. C. cited.

4. If two are bound in an Obligation, and the Obligee releaſes to one of them, provided the (f) other ſhall not take Benefit of this Releaſe,

(f) Where a Releaſe to one ſhall enure to another, 2 Rol. Abr. 412. Letter G.

the Proviſo is void, and the other ſhall take Advantage of the Releaſe, if he can get it to ſhew. *Hill.* 3 *Car.* between *Everard* and *Herne*, *Lit. Rep.* 190, 191. adjudged.

5. If Two are jointly and ſeverally bound in an Obligation, and the Obligee by a Deed covenants and agrees not to ſue one of them, this ſeems to be no Releaſe, but that he may ſue the other. *Hill.* 14 *Car.* in the Caſe of (a) *Dennis* and *Pain*, *Cro. Car.* 551.

(a) March 95. S. C.

1 Jon. 451. S. C. but S. P. does not appear. My firſt Part 472. pl. 2. S. C. the Point there being, whether a Retraxit being entered quoad one Defendant ſhould diſcharge the other.

6. If the Obligee covenants and grants to and with the Obligor, that during ninety-nine Years he will not put the Bond in Suit; this is only a Covenant upon which an Action will lie, but it cannot be pleaded in Bar of the Bond. *Trin.* 1 *Will. & Mar.* between (b) *Ailoffe* and *Scrimſhire*, *Carth.* 63, 64. adjudged.

(b) Salk. 573. S. C. adjudged,

Shor. 46. S. C. but differs in the Report.

7. But where the Covenant is, that the Obligee will not at any Time hereafter put the Bond in Suit, ſuch Covenant is pleadable in Bar as a Releaſe. In the Caſe of *Ailoffe* and *Scrimſhire*, *per Curiam.*

8. And in the Argument of *Ailoffe*'s Caſe it was allowed by all, that if a Letter of Licence contains the following Words, *viz.* (c) That if the Creditor ſues within ſuch a Time, his Debt ſhall be forfeited, ſuch Licence is pleadable in Bar. *Carth.* 64.

(c) But vide Shor. 46, 330, 331, &c.

(M) (d) A Perſonal Thing once ſuſpended ſhall be extinct.

(d) For this vide Salk. 302. — A Perſonal Thing cannot be releaſed upon a Condition ſubſequent, but may upon a Condition precedent, for there the Action is not ſuſpended till the Condition performed. My ſecond Part 11. pl. 8, 9.

1. If a Perſonal Action be ſuſpended by an Act of Law, this will not be any Extinguiſhment.

2. If a Woman Executrix of the Debtee, takes the Obligor to Husband, and after the Husband dies, this Suſpenſion was no Extinguiſhment, becauſe it was by an Act in Law, and in auter droit. Mich. 30, 31 El. cited, (e) Sir John Needham's Caſe, Co. 8. 136. adjudged.

(e) Ante B. 5. S. C. vide with the Notes there.

3. If Two bind themſelves jointly and ſeverally to one, and after the Obligee makes the Wife of one of the Obligors his Executrix, and dies, and after her Husband makes her Executrix alſo, and dies, the Obligation is extinct by the Suſpenſion. Trin. 12 Jac. B. between (f) Fryer and Gildrich adjudged.

(f) Ante B. 6. S. C.

Moor 855. pl. 1174. S. C. Hob. 10. S. C. 1 Brownl. 76. S. C.

4. If Two bind themſelves jointly and ſeverally to one, who makes the Wife of one of the Obligors Executrix, and dies, who adminiſters; this is a Releaſe in Law of the Debt, in as much as he acknowledges the Executrix to be the Wife of the Obligor at the Time of making her Executrix. Trin. 12 Jac. B. between (g) Fryer and Gildrich per Curiam.

(g) Ante B. 6. S. C.

Hob. 10. S. C. Moor 855. pl. 1174. S. C.

5. If

5. If A. be indebted to B. by Obligation, and after A. dies Inteſtate, and C. after takes Poſſeſſion of all the Goods of A. by which he becomes Executor of his own Wrong; and after B. takes Adminiſtration of the Goods of A. tho' B. may have Treſpaſs or Trover and Converſion againſt C. for the Goods (a) by Way of Relation, yet he may alſo have an Action of Debt upon the Obligation againſt C. as Executor of his own Wrong, with an Averment, that none of the Goods of the Inteſtate came to his Hands to ſatisfy any Part of his Debt, and that the Defendant C. after the Death of the Inteſtate, ſeiſed all the Goods of the Inteſtate before Adminiſtration granted to him, for the Reaſon that the Action of the Debtee being Adminiſtrator is ſuſpended when he hath Aſſets, is becauſe he may retain to ſatisfy himſelf, and the Law ſupplies it, and gives this Power to retain, for that he cannot ſue himſelf; and here when he hath no Aſſets he cannot retain, and he is not bound to bring an Action of Trover and Converſion, as he may, but may alſo bring this Action of Debt at his Pleaſure; for it is well proved, that his Action is not ſuſpended in as much as when he had no Aſſets he might have had an Action of Debt againſt the Heir. Trin. 1653. between (b) Aſhby and Child, Executor of Blackerly, adjudged per Curiam upon Demurrer. Intratur Mich. 1652. Rot. 686.

(a) For this vide Title Relation. 2 Rol. Abr. 399.

(b) Style 384. S. C. adjudged niſi.

(N) Suſpenſion (c) avoided.

1. If a Man leaſes a Rectory for Years reſerving a Rent, and upon Part of the Glebe in one Corner of a Cloſe is a Sheepcote, and the Leſſor enters and pulls it down, and the Leſſee re-enters, and after the Rent is behind, the Rent is ſuſpended notwithſtanding the Re-entry of the Leſſee, for Part of the Profit of the Thing leaſed was taken from the Leſſee, ſcilicet his Houſe, and that by the Act of the Leſſor. (d) Mich. 37 El. B. R. by Popham and Gaudy.

(c) By the Re-entry of the Leſſee after Eviction. 1 Bulſt. 204, 205. Style 432, 446. 1 Leon. 110. Hob. 306. Goulſ. 125, 126.

(d) Cro. El. 341. ſeems by the Time to be S. C.

2. If the Leſſor of a Wood or Orchard, rendring Rent, cuts it down, and the Leſſee re-enters, yet the Rent is ſuſpended: Quære this.

3. If the Leſſor enters upon the Leſſee and cuts down Trees, this is no Suſpenſion of his Rent, for the Bodies of the Trees did not belong to the Leſſee, ſo that the Prejudice to him is only in Reſpect of the Boughs and Shade, and the Taking the Boughs is no Suſpenſion of the Rent, for that does not iſſue out of them. *Mich.* 21 *Jac.* between *Harby* and *Clerk*, 2 *Rol. Rep.* 398. adjourned; but *Haughton* Juſtice was then of Opinion, it was no Suſpenſion.

4. If one leaſes a Warren reſerving a Rent, and the Leſſor plows a Field Part thereof, this not being a Rent, but a Sum in groſs due by Contract, this Entry or Uſer is no Suſpenſion. *Noy* 60.

5. If one leaſes Lands for Years to which there is Common in other Lands, and the Leſſor incloſes the Lands in which the Common was; this is no Suſpenſion of the Rent, for that did not iſſue out of the Common. *Mich.* 21 *Jac.* between (e) Sir *Nicholas Sanderſon* and *Harriſon*, *Cro. Jac.* 671.

(e) 2 Rol. Rep. 415. S. C. adjudged, Palm. 392. S. C. adjudged, and vide 2 Rol. Rep. 345.

6. If Grantee for Life of a Rent-charge, accepts a Leaſe for Years of Part of the Land out of which, &c. by which the Rent is ſuſpended; yet if he ſurrenders to Reverſioner, the Rent does not continue ſuſpended during the Term, but preſently revives. *Hill.* 3 *Car.* between Sir *Edward* (a) *Peytoe* and *Pemberton*, *Cro. Car.* 101, 102. adjudged *per totam Curiam*, for *quoad* the Leſſor and Leſſee, the Leaſe is determined, and the Poſſeſſion and Intereſt veſted in the Leſſor without Entry.

(a) Lit. Rep. 58, 82. S. C. adjudged, Hut. 94, 95. S. C. adjudged, Hetl. 50, 71. S. C.

7. If the Leſſor enters and pulls down a Penthouſe, Part of the demiſed Premiſſes, and detains it; yet this is no Suſpenſion of the Rent, but a Treſpaſs, for which the Leſſee may have an Action of Treſpaſs. *Trin.* 30 *Car.* 2. between *Roper* and *Lloyd*, 2 *Jon.* 148. adjudged.

8. If one hath two Houſes with one long Balcony going out of both, and lets one to *A.* generally, not mentioning the Balcony, reſerving Rent, and then lets the other to *B.* with the Balcony thereto belonging; and after the Leſſor divides the Balcony unequally, laying more to the laſt than to the firſt Houſe; this is no Suſpenſion of the Rent, becauſe the Balcony was not expreſſly let to the firſt, ſo never out of the Leſſor's Poſſeſſion. *Trin.* 27 *Car.* 2. 3 *Keb.* 520.

ERRATA.

IN *fol.* 273. *pl.* 6. *in the ſecond Line, for* after *read* before.
293. *pl.* 4. *in Nota, l.* 8. *from the Bottom, for* Salk. 297. *read* Salk. 293.
325. *pl.* 4. *in the ſixth Line, for* Bail *read* Principal.
326. *at the Top in the uppermoſt Line, for* Principal *read* Bail.

Some Names of the Caſes in Title *Error*, being omitted in the Table to the ſaid Title, are inſerted in the following Table.

THE

TABLE

OF THE

Names of the Cases

IN THE

Third Volume

OF

D'ANVERS's Abridgment.

N. B. *Those Cases in the following* TABLE *mark'd thus* *, *are to be found in the Note on the Pl.*

		Page	Pl.
Ab.			
Abbot of Strata Marcella (*the Case of*)		97	26
Abraham *and* Twig	*	184	1
		185	10
Abram *and* Cunningham		350	11
Ac.			
Acton *and* Pitcher	*	244	1
Ad.			
Adams *and* Dixon		367	2
Ag.			
Agard *and* King		216	10
Ai.			
Aire *and* Aden		320	2
Ailoffe *and* Scrimshire		427	7
Ailoffe's *Case*		427	8
Al.			
Altham's *Case*		39	1
Albany's *Case*		84	8
Alton Woods (*the Case of*)		232	2
Alden's *Case*		306	4
Alexander *and* Lamb	*	385	4
Aldrich *and* Walthal	*	396	3
Aldworth *and* Peel	*	405	5
An.			
Anonymus.		155	7
		215	22
Ansly *and* Chapman	*	175	7

Andrews

The Table of the Names of the Caſes.

An.

	Page	Pl.
Anſly *and* Chapman	* 177	23
Andrews *and* Harborne	313	3
	314	4
Andrews *and* Cope	340	1
	340	2
	341	3
	341	4
Andrews *and* Blunt	* 422	1

Ap.

Aprice *and* Hayes	215	20

Ar.

Archer's *Caſe.*	181	16
Armiger *and* Biſhop of Norwich	* 247	1

Aſ.

Aſtry *and* Ballard	325	5
Aſhby *and* Child	374	3
	428	5

At.

Atkins *and* Atkins	237	3
Atkinſon *and* Dennis	* 247	1
Atkinſon *and* Coateſworth	266	11
Atkinſon *and* Corniſh	356	9

Au.

Auſtin's *Caſe*	195	1
Audly *and* Hall	* 318	3
Audry's *Caſe*	* 348	10
Auſtree *and* Audely	364	4

Ba.

BAldry *and* Jolinſon	115	5
Barns *and* Cary *& al'*	122	6
Barns *and* Cary	* 125	1
Barwick's *Caſe*	161	10
Baker *and* Raymund	* 175	8
Bacon *and* Hill	* 177	21
Bath *(the Biſhop of) his Caſe*	203	3
	203	4
	210	9
	210	10
	213	14
	213	15
	214	16
	216	3
	216	4

Ba.

	Page	Pl.
Bath *(the Biſhop of) his Caſe*	216	7
	216	8
Baſſet *and* Lewis	* 211	6
Barns *and* Freeman	232	6
Barns *and* Freeman	* 234	7
Bampfield *and* Popham	* 237	5
Bayly *and* Murin	* 249	1
Bayly *and* Munday	* 250	4
Bayly *and* Bunning	* 254	7
	* 319	7
Banbury *(Earl of) his Caſe*	256	18
Baker *and* Willis	274	6
Bagſhaw *and* Gallard	282	1
	282	2
Bagſhaw *and* Goward	* 282	1
Baskerville *and* Brochel	317	22
	317	23
Barkely's *Caſe*	327	7
Barns *and* Hill	330	6
Baynard's *Caſe*	332	4
Bane's *Caſe*	380	3
	401	1
Barret *and* Winchcomb	381	7
Barker *and* Dye	384	17
Baker *and* Berisford	* 386	12
	* 387	2
	* 387	6
Bathurſt's *Caſe*	386	14
Barnhurſt *and* Sir Charles Yelverton	411	2

Be.

Beckwith's *Caſe*	14	16
Beecher's *Caſe*	37	1
	37	3
	37	4
	37	5
	37	7
	54	8
	97	26
Bentham's *Caſe*	77	1
Bedingfield (Anne) *her Caſe*	147	1
Berry *and* Goodman	166	13
Beresford's *Caſe*	185	11
Bereton *and* Nichols *& al'*	* 186	13
Beck's *Caſe*	* 186	13
Bedingfield's *Caſe*	* 197	8
Beveſton *and* Huſſey	201	8
Bedford *and* Johnſon	232	14
Beamont's *Caſe*	239	8
	293	2
Beverly *and* Beverly	307	3
Beamont *and* Long	308	3
	* 309	7
Benche *and* Wiſeman	319	7

Bellows

The Table of the Names of the Caſes.

Be.

		Page	Pl.
Bellows (*Sir* Henry) *and* Handford		322	2
		330	5
Beverly *and* Cornwall	*	332	5
Bethel *and* Stanhop	*	372	14
		374	2
Bethel *and* Bethel		378	22
Beerbrook *and* Read		394	2
Bellew *and* Juckleden		400	5
Beak *and* Kent	*	413	1
Benton *and* Trot	*	420	15

Bi.

Biſhop's *Caſe*		46	1
Bickley *and* Bickley		194	5
Biſcoe *and* Holt	*	244	1
Bindon (*Viſcounteſs of*) *her Caſe*		359	10
Bird *and* Culmer		400	3

Bl.

Blunden *and* Baugh		166	15
Blithman *and* Blithman		197	8
Blandford *and* Blandford		200	6
Blomfield's *Caſe*	*	324	1

Bo.

Boyton's *Caſe*		113	4
		115	2
		118	11
		118	12
Bowles *and* Laſſels		117	4
Bonner *and* Stokely		122	5
Bovy's *Caſe* (*Sir* Ralph)	*	126	3
Bowles *and* Walter		196	1
Bowe (*Sir* Thomas) *his Caſe*		235	2
Bowle (Lewis) *his Caſe*	*	238	5
		239	7
Boyle *and* Scarborough		252	6
Boverton *and* Evans		269	6
Boucher *and* Wiſeman		321	6
Bonner *and* Stukely		322	4
Bond *and* Green		385	2
Bond *and* Bayly		394	1
Borret *and* Boyes		403	6
Bowers *and* Cook		414	2
		414	3

Br.

Brigham *and* Godwin		148	25
Bruerton *and* Raynsford		166	8
		166	9
Brudnell's *Caſe*		170	1

Br.

		Page	Pl.
Brudnell's *Caſe*		171	7
		309	4
		350	9
		356	8
Brian *and* Baldwin		174	5
Bridgewater (*Counteſs of*) *and* Bolton	*	175	12
Brown *and* Pells		179	2
Brown *and* Jews		189	8
Braybrook's *Caſe*		221	23
Bredon's *Caſe*		223	11
		224	4
		224	7
		224	8
Brian *and* Cauſen		237	2
Brereton *and* Evans	*	257	6
		278	2
		280	1
Brown (*Sir* George) *his Caſe*		278	7
Brownlow *and* Lambert	*	281	1
Brown's *Caſe*	*	294	7
Britton *and* Cole	*	305	1
Briers *and* Goddard		354	3
		386	7
Brown *and* Wood		354	5
Bradbury *and* Reynel	*	374	2
Brown *and* Collins	*	375	4
Brightman *and* Keighley		378	20
Browning *and* Fuller	*	381	5
Brown *and* Purchaſe	*	383	10
Brunet *and* Holden	*	394	1
Bracebridge *and* Baskervil	*	403	6
Bridgeman *and* Lightfoot		403	8
Brown *and* Wood	*	407	1
Brown *and* Brown	*	409	6
	*	410	8
Broker *and* Charter	*	411	1
	*	412	5
Brook *and* Stroud		412	5
Bracebridge's *Caſe*		415	6
		416	11
Bradſhaw *and* Eyre	*	419	3
Bradſhaw's *Caſe*		424	4

Bu.

Burford *and* Some *and* Gaier		119	4
Buſhe's *Caſe*		121	6
Buſtard's *Caſe*		129	8
		131	12
		133	2
		133	3
		134	14
Bull *and* Wyott		159	1
		257	3
		262	3
Butler *and* Fincher		160	5

The Table of the Names of the Caſes.

Bu.

		Page	Pl.
Buckler's *Caſe*		161	9
	*	217	4
	*	218	5
		220	2
	*	222	26
	*	230	16
Bullen's *Caſe*	*	177	21
Bullen *and* Grant	*	187	9
Burton *and* Horton		199	3
Burton's *Caſe*		199	4
Buſh *and* Allen	*	200	8
Buxton *and* Ballman		268	1
Butler *and* Dell	*	309	7
Buchly *and* Perk		379	27
Burnet *and* Dixe		385	2
		385	3
Burnet *and* Holden		386	13
Bull *and* Wheeler	*	403	4
	*	404	9
Buckhurſt's *Caſe*		416	20

By.

Byron's *Caſe*	*	352	5
Byron *and* Byron	*	352	4

Ca.

CArter *and* Horner	*	175	12
Caponhurſt *and* Caponhurſt	*	209	1
Candle *and* Clarke	*	214	17
Caſtell *and* Dodd		224	2
Carpenter *and* Collins		235	1
		235	1
		236	1
Carter *and* Clacole	*	248	1
Cawdry's *Caſe*	*	290	3
Carter *and* Claypole		303	1
Cambell (*Sir* Tho) *his Caſe*		321	5
Carr *and* Copping		322	1
		339	5
Cave (*Sir* William) *and Sir* William Fleetwood	*	339	1
Carter *and* Croſts		348	11
		348	12
	*	352	4
Carver *and* Haſelrig		356	6
		356	7
Caſtillion *and* Smith		404	9
Catesby *and* Wilkinſon		423	3

Ch.

Chamberlain *and* Turner	*	175	6
Chudleigh's *Caſe*		183	2

Ch.

		Page	Pl.
Chudleigh's *Caſe*		225	7
		229	2
Chedington (*Rector of*) *his Caſe*		209	4
		209	6
		209	7
		210	14
	*	210	16
		211	2
		211	4
Chantrel *and* Randal		214	17
Chicheſter (*Biſhop of*) *and* Freeland	*	246	1
Charters *and* Peters	*	320	4
Chappel's *Caſe*		335	1
Chapman's *Caſe*		362	2
Chandler *and* Thomſon		377	15
Chiberton *and* Trudgeon		381	9
Chard *and* Bird	*	381	9
Chaffe *and* Kelland		399	1
Chamberlyn *and* Nicholls		400	6
Childs *and* Weſcot	*	415	4
	*	416	17

Cl.

Clerk *and* Molineux	*	117	8
Clanrickard (*Earl of*) *and Viſcount* Liſle		152	25
Clanrickard (*Earl of*) *his Caſe*		152	26
		156	2
Clark *and* Day's *Caſe*		172	1
	*	189	4
Clache's *Caſe*		179	1
		188	3
Clarke *and* Davie		189	4
Clanricard (*Lord*) *& al'*		224	4
Clerk *and* Andrews	*	324	8
		340	2
		341	4
	*	346	1
Cleer's *Caſe*		326	2
Cleydon *and* Spenſer	*	387	6

Co.

County Palatine		8	6
		8	9
Coachman *and* Hally		126	1
Corbet (*Sir* Andrew) *his Caſe*		162	1
Cobb *and* Betterton		169	6
Cochet *and* Sheldon	*	170	4
Collier's *Caſe*		177	21
		177	22
		177	23
Cooper *and* Franklin	*	188	4

The Table of the Names of the Caſes.

Co.

		Page	Pl.
Cooper *and* Burrold		201	4
Cole *and* Rawlinſon		201	6
Cordal's *Caſe*		203	6
Combe's *Caſe*		204	1
Corniſh *and* Cawſey		213	12
Coventry *and* Litchfield (*Biſhop of*)	*	247	1
Coſtard *and* Wingate	*	249	1
Corbet *and* Daye		271	5
Coot *and* Linch		298	3
Cock's *and* Barnſley		306	4
Coa's *Caſe*		321	2
Cowly *and* Lydeat		324	8
Colborne *and* Wright		356	11
Cope *and* Lewin	*	381	5
Coulter's *Caſe*		385	4
Conny *and* Baron		394	1
Collins *and* Thoroughgood		403	8
Cook *and* Croſs	*	417	1
Cox *and* Matthews	*	421	7
Cotton *and* Heath		423	4

Cr.

Crawley *and* Marrow		196	8
		275	4
Croker *and* Kelſey		196	9
		197	3
Croft *and* Walbank	*	356	6
Cranmer's *Caſe*	*	367	3
Creſwell *and* Green		401	2
Croſman *and* Read	*	417	5

Cu.

Cumberland (*Earl of*) *and* Weaver		120	2
Cumbden *and* Clarke		189	6
Cummin *and* Brandlin		318	3
Cuts (*Sir* John) *and* Bennet		381	8

Da.

DAlamore *and* Heskins		56	21
Daniel *and* Waddington		169	3
		170	2
Daniel *and* Ubley		178	25
Darcer's *Caſe*		212	7
Dalton *and Biſhop of* Ely	*	247	1
Davenant *and the Biſhop of* Sarum	*	247	1
Day *and* Auſten *and* Bisbich		315	1
Darſon's *Caſe*		320	1
Damport *and* Pinſent		355	2
Daviſon *and* Helſop	*	380	2
Davis *and* Davis	*	382	2

Da.

Darrel *and* Andrews *and* Cope		423	2
		424	3

De.

Deacon *and* Marſh	*	175	13
Dell *and* Cockdell		205	3
Dethick *and* Bradburn		242	4
Dennis *and* Drake	*	329	2
	*	330	3
Deering *and* Torrington		379	28
Denham *and* Stephenſon		382	10
Dennis *and* Pain		427	5

Di.

Digby (*Sir* Kenelme) *and* Jordan		159	1
Dillon *and* Frain	*	183	2
Dickſey *and* Spenſer.		221	24
Dinſdale *and* Iſles		234	9
Dixon *and* Adams		307	4
Diggs's *Caſe*		425	10

Do.

Dowman's *Caſe*		131	2
Downhall *and* Catesby		175	10
Doiley *and* Jolliffe		264	13
Doiley *and* White	*	264	13
Doddington's *Caſe*		268	1
Doubty *and* Fawn	*	268	1
Doubty *and* Neal	*	269	5
Dod *and* Conny		320	3
Dorcheſter *and* Web	*	401	7
		417	1
Downing *and* Seymore	*	416	14
Dowſe *and* Jeffries		426	1

Dr.

Drury (*Dr.*) *his Caſe*		64	1
		64	6
		65	1
		66	1
Drake *and* Munday		208	8

Du.

Dun *and* Patie		114	1
		114	2
Dutton *and* Ingham		194	4
		424	3
		424	4
Duke *and* Smith	*	257	4

Dy.

The Table of the Names of the Caſes.

Dy.

		Page	Pl.
Dyer *and others, and* Aſ-finchman		327	10
		345	4

Ed.

EDen *and* Lloyd	*	113	1
Edmonds *and* Booth		161	11
Edwards *and* Rogers	*	276	4
Edſar *and* Smart		311	5
		334	5
Edwards *and* Stapleton		381	5

Ee.

Eeles *and* Lambert	*	397	1

Eg.

Egerton *and* Egerton		150	8
Egerton (*Sir* Tho.) *and* Brereton		338	20

El.

Elton *and Sir* John Lenthal		119	3
Elme *and* Leaves		212	10
Elmer's *Caſe*	*	247	1
Ely (*Biſhop of*) *and* Clare-hall *in* Cambridge		420	19

Em.

Emerſon *and* Emerſon		361	6
Emſon *and* Williamſon		415	2

Er.

Eriſh *and* Reeves	*	187	9
Erington *and* Erington		196	7

Eſ.

Eſſex's *Caſe* (*the Sheriff of*)		113	5
		336	8
Eſſex (*Sir* William) *his Caſe*		207	1

Ev.

Ever *and* Aſton	*	205	4
	*	241	8
Evan *and* Thomas		206	1
Evans *&* al' *and* Aſcuith	*	285	4
Evelyn *and* Leveſon		378	24
Everard *and* Herne		426	4

Ex.

		Page	Pl.
Exeter (*Biſhop of*) *his Caſe and* Starr	*	297	1

Ey.

Eyres *and* Falkland		170	9

Fa.

FAllow *and* Lambert		116	1
Fawcet's *Caſe*		175	11
		201	3

Fe.

Fenwick *and* Mitford		159	9
Fernes (*Dean and Chapter of*)		232	3
		286	3
		288	4
Felgate *and* Gardiner		314	4
Fenner (*Dame*) *and Sir* Lewis Dives		388	3

Fi.

Fiſh *and* Bellamy	*	213	15
Fiſh *and* Wiſeman	*	335	1
Finch (*Sir* Moyl) *his Caſe*		357	5
		357	6
Finch *and* Bodyll	*	359	5
Fiſher *and* Snelling	*	386	11
Fiſher *and* Richardſon	*	391	14

Fl.

Fletcher *and* Farrer		269	10
		269	11
Floyd *and* Bethell		302	4

Fo.

Fowler *and* Ougley	*	176	19
Forteſcue *and* Abbot	*	178	24
Foot *and* Berkly		214	18
		214	19
Fox *and* Collier	*	244	2
Fox's *Caſe*		295	1
Folgate *and* Mole	*	325	2
Foſter *and* Jackſon		338	22
		340	1
Ford *and* Glanvile		355	3
Fortree *and* Fortree	*	407	1
Foxwiſt *and* Tremain		412	3
Foxwith *and* Tremain	*	412	3

The Table of the Names of the Caſes.

Fr.

		Page	Pl.
Freak *and* Thomas		* 177	23
Freſhwater *and* Rous		* 197	8
Freeman *and* Freeman		325	4
Fryer *and* Gildridge		417	6
		427	3
		427	4

Fu.

Further *and* Further		* 383	9
		* 384	12
		* 395	1

Ga.

GArnon's *Caſe*		* 122	4
		322	4
		* 329	1
Garret *and* Blizard		224	9
Garret *and* Fulwood		* 293	3
Gabriel's *Caſe*		309	7
Gaudy *and* Ingham		* 400	2

Ge.

Germin *and* Willis		165	1
		165	3
		165	4
Geary *and* Read		207	1
Germain *and his Wife*, and Otcherd	}	210	17
Germin *and* Randal		270	17
Gee *and his Wife, and Sir* Francis Fane	}	307	6
		308	7
		* 326	3
Germain *and* Rowles		389	4
		390	12

Gi.

Gimlett *and* Saundrey		226	1
Gilbert *and* Witty		* 236	1
		238	2
Gilman *and* Hore		279	9
Gibſon *and* Brook		* 401	7
		* 404	2

Gl.

Glaſcock *and* Morgan		* 340	1
		* 341	5

Go.

		Page	Pl.
Goff *and* Haywood		* 169	5
Goſhake *and* Chiggil		* 209	4
Goſtwick *and* Maſon		* 216	6
Goodwright *and* Corniſh		237	4
Goodridge *and* Warburton		* 252	4
Goddard (Eliz.) *her Caſe*		* 280	2
		280	3
Goddard *and* Vouchers		314	4
Goodier *and* Ince		314	5
Goſlyn *and* Osborne		349	5
Gold *and* Strode		353	8
Good *and* Pinſent		355	1
Godfrey *and* Woodard		371	18
Goldſmith *and* Sidnar		392	4
Gomerſal *and* Ask		* 394	1
Goodier (*Sir* Henry) *his Caſe*	}	411	1

Gr.

Greenwood *and* Tiber		* 166	4
Greene *and* Armeſteed		174	3
		178	2
Greeve *and* Duel		* 174	3
		* 177	21
		* 178	2
Grute *and* Locroft		* 210	8
Green *and* Edwards		* 210	16
		* 211	2
Gresbrooke *and* Fox		347	1
		347	3
		347	4
		347	5
Grant's *Caſe*		359	3
		359	4
Gray; *and* Pawlet *and* Bartholomew	}	368	1
Greeves *and* Weigham		373	2
Gresbrook's *Caſe*		373	2
Green *and* Wilcox		383	10

Gu.

Gurry *and* Sanderſon		* 187	9
Gutch *and* Dayntree		314	4

Ha.

HArvey *and Sir* George Reynell	}	119	2
		* 119	4
		126	2
		126	3
Haywood *and* Fulcre		* 165	4
Hammond *and* Wood		166	16
Hannam *and* Woodford		* 166	16

The Table of the Names of the Cases.

Ha.

		Page	Pl.
Harbin *and* Loby	*	169	3
Hawkins's *Case*	*	176	18
Hambleden *and* Hambleden		176	19
Hanbury *and* Cockerell *& al'*		179	4
Haydon's *Case*		186	8
		187	9
Hatt *and* Arrowsmith		205	4
		205	5
Haddon *and* Arrowsmith	*	205	4
	*	205	5
Havergill *and* Hare		205	6
Harrington *and* Wise		207	2
Hare *& al' and* Cely		208	6
Hare *and* Okely	*	208	6
Harrison *and* Chester		254	7
Hart *and* Buckminster		270	19
Harvy *and* Blackdole		282	3
		284	1
Harvy *and* Blackdon		282	3
Harman *and* Powel	*	296	2
Hall *and* Wingfield	*	314	6
		316	11
Harris *and Lord* Montjoy		327	2
Harvy (*Lady*) *and* Norton	*	334	5
Hawkyn *and* Ardyn		338	21
Hanger *and* Fry		342	8
		342	9
Hayton *and* Wolfe	*	350	10
		411	2
Haul *and* Salvin	*	356	6
Harwell *and* Harwell		358	8
Hastings (*Lord*) *and* Douglass		358	9
Haws *and* Loder	*	372	14
Harwood *and* Waynam		376	5
Harecourt *and* Wrenham	*	383	8
Hampton *and* Bartholomew		383	11
Harding *and* Salkil		384	18
Hampton *and* Boyer		391	15
Harrison's *Case*		392	1
Hargrave's *Case*		395	2
Hatton *and* Maschal	*	412	3
Hancock *and* Proud	*	413	3
Harrington (*Sir* John) *and* Garroway		425	7
Harby *and* Clerk		428	3

He.

Hemings *and* Puncharden's *Case*		159	2
Hemings *and* Pantherden		160	5
		160	6
Hearne *and* Allen	*	180	5
Henly *and* Walsh	*	282	2
		284	2

He.

		Page	Pl.
Henly *and* Walsh		284	3
Hendon's *Case*		305	2
Heydon *and* Heydon		306	10
Heydon (*Sir* Christopher) *his Case*	*	333	1
	*	333	3
Hensloe's *Case*		349	1
Heliar *and* Casbord	*	388	4

Hi.

Hinton *and Sir* John Lenthall		119	3
Hiblin *and* Slacke		163	1
		224	6
Hill *and* Upcheir		187	9
Hinchman *and* Iles	*	234	9
Higham *and* Baker	*	236	1
Higham's *Case*	*	254	2
Hickman *and* Machin		324	4
		324	7
Higgen's *Case*	*	325	1
Hill *and* Hawes		368	4

Ho.

Horton *and* Horton	*	199	3
Hopewell *and* Ackland		201	7
Howard (*Sir* Robert) *and* Wood		206	9
Holms *and* Seller		209	10
Holt *and* Lister	*	220	9
		222	26
Howard (*Sir* Charles) *his Case*	*	232	5
Holms *and* Meynel	*	238	2
Holland *and* Downs	*	252	3
Hoe's *Case*		345	1
Hodge *and* Clare	*	351	4
Holliday *and* Boas		377	13
Horman *and* Harman		394	15
Holt *and* Hore		403	7
		403	8
House *& al' and Lord* Petre		411	3
		412	4
Hodgson *and* Thorborough		424	5

Hu.

Husbands *and* Cole	*	114	1
Hughs *and* Crowther	*	170	2
	*	171	6
Hunt *and* Singleton	*	248	1
	*	249	1
	*	250	4
Hughs *and* Bendy	*	294	7.
Humphry's *Case*		319	6

The Table of the Names of the Caſes.

Hu.

	Page	Pl.
Huyt *and* Cogan	345	3
Hughſon *and* Web	391	14
Hugh's *Caſe*	* 407	1

Hy.

Hynd's *Caſe*	253	4

Ja.

JAmes *and* Pierce	* 118	13
Jackſon *and* Humphrys	121	10
James *and* Portman	* 233	1
James *and* London	* 277	1
James's *Caſe*	* 279	1
Jay *and* Bond	291	6
	294	1
James *and* James	326	3
	* 350	3

Id.

Idle *and* Coke	186	14

Je.

Jemot *and* Cooly	* 163	4
Jenning's *Caſe*	165	5
Jenkins *and* Young	185	12
Jemmot *and* Cowley	* 205	6
Jefferie *and* Trefferie	308	3
Jennings *and* Hall	* 322	4
Jenkins *and* Plume	379	26
Jeffrys *and* Dee	* 413	1

In.

Ingram *and* Bartlett	419	12

Jo.

Jones *and* Pope	125	3
Johnſon *and* Kerman	175	12
Johnſon *and* Smart	180	9
Johns *againſt* Lee *and* Pomeroy	313	3
Jones *and* Williams	338	21
Johns *and* Williams	* 338	21
Jones *and* Rowe	* 350	3
	* 359	5
Jordan *and* Foſſet	384	16
Johns *and* Adams	406	17
Jordan *and* Atwood	419	8
	419	10
	419	11

Ir.

	Page	Pl.
Ireland *and* Coulter	* 385	4

Ju.

Juel *and* Lingley	209	1
	209	2
Juel's *Caſe*	269	3

Ke.

KEnrick *and* Burges	372	13
	373	3
Keble *and* Osbaſton	374	1
Kelſock *and* Nicholſon	389	4

Ki.

King *and Lord* St. John	* 7	7
	* 53	1
King *and* Kemp	161	12
King *and* Barns	* 294	7
King *and* Okey *& al'*	305	5
King *and* Rogers	305	6
King *and* Pullen	* 305	6
King's *Caſe*	* 315	1
	* 318	1
	* 329	1
King *and* Remball	174	1
	174	2
	180	7
	180	8
King *and* Melling	182	21
King *and* Perſeval	268	2
King *and* Fouler	* 293	4
	295	2
	296	3
	296	4
King *and* Chandler	* 305	6
Kightley *and* Kightley	* 378	20
Kindler *and* Leverſage	203	8

Kn.

Knollis *and* Robbins	* 348	11
Knyveton *and* Latham	378	25
Knight *and* Hilton, *and* Copping	402	11
Knighton *and* Moreton	413	5

La.

LAncaſtel's *Caſe*	41	5
Langden *and* Wallis	118	15
Lampet's *Caſe*	* 367	2

The Table of the Names of the Caſes.

La.

		Page	Pl.
Lathbury *and his Wife, and* Humfry		414	1

Le.

		Page	Pl.
Lenthall *and* Lenthall		118	13
Leighton *and* Walwyn		122	4
Leventhorp *and* Aſhbie		168	1
Lee *and* Withers	*	177	22
Legwood *and* Burriſh		180	10
Leigh *and* Brace		185	13
Lee *and* Brown		186	8
		187	9
		205	3
L'Eſtrange *and* Temple		228	5
Levil *and* Lewknor	*	309	5
Lemaſen *and* Dixon		360	2
Leman *and* Fooke		393	13
Lee *and* Ridford		399	1
Levanne's *Caſe*	*	407	1

Li.

		Page	Pl.
Lief *and* Saltington	*	178	25
Lilly *and* Taylor	*	189	4
Linch *and* Hook	*	257	2
		268	5
Littleton *and* Hibbens		393	11
	*	396	2
Linchden *and* Winſmore		416	10
Lincoln (*Biſhop of*) *and* Cooper	*	420	15

Ll.

		Page	Pl.
Lloyd *and* Wilkinſon	*	209	7
	*	211	2
	*	211	4
Lloyd *and* Gregory	*	248	1
Lloyd *and* Bethell		301	2

Lo.

		Page	Pl.
Lovie (Leonard) *his Caſe*		168	2
		186	1
Lovelace *and* Lovelace	*	179	1
	*	182	21
Lodington *and* Kime		183	24
Loves, *his Caſe*		206	2
		366	1
Lochoe *and* Palfriman		257	6
London's *Caſe*		267	1
		277	1
London (*Biſhop of*) *his Caſe*		419	6

Lu.

		Page	Pl.
Lutwich *and* Mitton	*	163	1
Luxford *and* Luxford		182	22
Lunn *and* Dodſon		352	4
Lucy *and* Levington		363	5

Ly.

		Page	Pl.
Lynacre *and* Rodes		338	24

Ma.

		Page	Pl.
MAY *and* Proby *and* Lumley		116	1
		116	2
Madox *and* Young		126	1
Manning (Matthew) *his Caſe*		162	1
Maſon *and* Street		165	6
Manxell's *Caſe*		186	2
		186	3
Machil *and* Clerk	*	197	8
		198	10
		198	11
		198	14
Mathews *and* Whetton	*	204	1
Maldon's *Caſe*		208	5
Mancheſter *College and* Trafford		215	23
		216	9
Martin *and* Savery	*	224	8
Marler *and* Wright	*	247	1
Markham *and Sir* Francis Forteſcue		264	12
Maby *and* Shephard		268	4
Malary's *Caſe*		270	12
Marſh's *Caſe*		360	2
Maſon *and* Dixon		360	2
Maſon *and* Hampton	*	382	10

Me.

		Page	Pl.
Metcalf's *Caſe*		19	4
Mellows *and* May	*	160	5
Meredith *and* Jones		185	12
Melwich's *Caſe*		204	1
Mead *and* Lenthal	*	205	7
Mere *and* Ridont		229	13
Mead *and* Cheyney		317	21

Mi.

		Page	Pl.
Mitford's *Caſe*	*	158	8
Miller *and* Manwaring		167	1
Middleton *and* Swaine	*	176	18
Milford *and* Smith	*	200	7
Miller *and* Manwaring		212	8
Miller *and* Grewe		271	6

The Table of the Names of the Caſes.

Mi.

		Page	Pl.
Mitchel *and Sir* John Crofts		333	4
Middleton *and* Powel		337	18

Mo.

Moor *and Sir* George Reynolds	*	122	4
Moor *and* Parker		182	23
Moore *and* Muſgrave		212	11
Montjoy's *Caſe*	*	248	1
Mot *and* Hales	*	249	1
Morgan *and* Vaughan		259	2
Moreton *and* Hopkins	*	273	5
Morrice *and* Iſham	*	279	1
Morly *and* Urlin		332	4
Mounſon (*Sir* Robert) *and* Clayton		336	6
		340	10
		340	11
Moreton (*Juſtice*) *his Caſe*		361	5
Morly *and* Polhill		363	6
Morgan *and* Williams	*	381	9
Moule *and* Mody	*	388	4
Morgan *and* Green		391	18
Mounſon *and* Bourn		402	9
	*	404	2
		405	11
		405	12
		406	14

Mu.

Muſgrave *and* Wharton	*	314	6

Na.

NAyler *and* Sharpleſs	*	115	6

Ne.

Nevell *and* Nevell		184	1
		184	2
Nevill's *Caſe*		186	2
		186	3
		186	4
		186	6
		186	7
Newberrie *and* Rathebone		216	1
Newton *and his Wife, and* Weeks *and his Wife*		265	10
Needham (*Sir* John) *his Caſe*		347	1
		417	2
		417	3
		417	4
		417	5
		427	2

Ne.

Needham's *Caſe*		354	4
		354	5
Newton *and* Richards	*	383	8
Newport *and* Godfrey		394	16
Necton *and* Sharp		397	1
		397	2
Nevell *and* Delabar, *and others*		400	4

No.

Norgate's *Caſe*		120	4
Norden *and* Fox		125	4
Norgate *and* Snape		312	3
Norton *and* Sharpe		323	5
Norton (*Sir* Daniel) *his Caſe*		335	2
Norwich (*Mayor and Commonalty of*) *and* Johnſon	*	372	13
		372	15
Norden *and* Levit	*	378	21
Norwood *and* Read		380	1
		390	5
Norwood's *Caſe*	*	390	12
Noel *and* Nelſon		401	7

Ob.

OBrian (Revan) *& al' and* Knivan	*	286	3
Obrian *and* Ram		312	10

Of.

Offley *and* Beets	*	407	1

Og.

Ognel's *Caſe*		67	12
	*	120	2
		354	1
		359	5
		365	6
Ognel *and* Paſton	*	326	2
	*	335	1
		342	1

Ol.

Oland's *Caſe*		234	1
		234	2
Oldham *and* Pickering	*	379	30
	*	409	5

The Table of the Names of the Caſes.

Om.

		Page	Pl.
Omelaughland *and* Hood		272	10
		275	5

Op.

Opee *and* Thomaſius	*	195	4
		198	9

Or.

Ordeway *and* Godfrey		383	8

Of.

Oſſory (*Biſhop of*) *his Caſe*	*	285	7

Ow.

Owen *and* Apres	*	160	5
	*	245	2
	*	246	1
	*	247	1

Pa.

PAlmer *and* Thorp	*	159	1
Paget *and* Voſcius		171	10
Paget (*Lord*) *his Caſe*	*	211	2
Paulter *and* Cornhill & *al'*		241	8
Pain's *Caſe*	*	241	1
Payne *and* Shelton		270	13
Paramour *and* During		270	14
		270	15
Palmer *and* Stannage		273	5
		273	6
Paſchal *and* Warren	*	309	4
Parks *and* Moſſe *and* Howe		318	5
Panton *and* Hall		334	6
Palmer *and* Knowles	*	341	3
		341	6
Palmer's *Caſe*		343	2
Palmer *and* Humphry	*	344	1
Partlet *and* Cray	*	368	1
Parker *and* Sweetman	*	372	13
Palmer *and* Litheland		375	6
Packington *and* Culliford		379	2
Parker *and* Amys	*	383	9
Palmer *and* Lawſon		384	12
		384	13
		384	14
Parker *and* Atfield		385	20
		394	17
Pannel *and* Fenn		388	1
Partridge's *Caſe*		398	5
Packman's *Caſe*	*	407	1
Palmer *and* Allicock	*	409	7

Pa.

		Page	Pl.
Palmer *and* Allicock	*	410	8
Parry *and* Parry	*	414	1
Packer *and* Welſtead		420	17
Palmer *and* Fletcher	*	421	7
Padine *and* Jane		426	1

Pe.

Pettifer's *Caſe*		64	12
		404	2
Peto *and* Pemmerton		164	12
Pettiwood *and* Coke		176	18
Pell *and* Brown	*	177	21
Pexhall (*Sir* Richard) *his Caſe*		203	6
		203	7
Perry *and* Allen	*	207	1
Pelham (*Sir* William) *his Caſe*	*	220	1
	*	221	12
		228	4
Pemman *and* Prene	*	236	1
Pemble *and* Stern	*	244	2
Penton *and* Brown	*	302	10
Pechy *and* Foſter		305	4
Pendavis *and* Kenſham		325	9
Perrow's *Caſe*		332	4
Pennoir *and* Brace	*	332	6
Pemberton *and* Cony		363	2
Peaſe *and* Stileman		367	2
Perrot *and* Auſtin		391	16
	*	404	2
		404	3
Percival *and* Criſp	*	409	4
Peers *and* Lucy		420	18
Peytoe (*Sir* Edward) *and* Pemberton		429	6

Ph.

Phorbet's *Caſe*		3	5
Philpot *and others*		375	1
Phiney *and* Phiney	*	409	5

Pi.

Pilford (Robert) *his Caſe*		77	3
Piers, *and* Alevy *and* Home		223	1
Piggot *and* Ruſſel	*	225	2
Piggot *and* Piggot		225	8
Pictoe's *Caſe*		306	3
Piggot *and* Gaſcoign		355	4
Pinchon's *Caſe*		380	1
		389	4
		390	5
		397	2

The Table of the Names of the Caſes.

Pl.

		Page	Pl.
Plaiſes's *Caſe*		108	8
Plat's *Caſe*		113	4
Plat (*Lady*) *and* Sleep	*	416	10
Plummer *and* Whitchcot	*	124	1
Pleſaunts *and* Higham		207	4
Pleadal *and* Pleadhal	*	279	1
Pledall *and* Coſmore		283	4
		283	5
Plummer *and* Lea		333	6

Po.

Podger (Marg.) *her Caſe*		220	2
Pouſely *and* Blackman	*	231	5
	*	235	1
Powſeley *and* Blackman		231	12
Popham *and* Bampfield		237	5
Powel *and* Herman		296	2
Portman *and* Morgan	*	302	7
Poole's *Caſe*		315	2
Popham *and* Hunt		362	1
Polus *and* Henſtock	*	419	12

Pr.

Price *and* Jones	*	9	15
Price *and* Vaughan		163	5
Preſton *and* Love		166	12
Prettiman *and* Coke	*	179	1
Prat *and* Phanner		272	12
Prince's *Caſe*		356	12
Prince *and* Simpſon	*	357	1
		357	4
Price *and* Atmore		367	2
Price *and* Parker	*	407	1
		410	1

Pu.

Putnam *and* Coke	*	176	18
Putteral's *Caſe*		195	6
Pultney *and* Forebench		314	4
Puttenham's *Caſe*		326	2

Py.

Pybus *and* Mitford	*	158	8

Qu.

Queen *and* Templeman	*	253	7
Queen *and* Sangway	*	294	7
Queen *and* Hill		296	5

Ra.

		Page	Pl.
Raby *and* Robiſon	*	21	18
Raynor (*Lady*) *and* Holcroſt *and his Wife*		142	8
Rawling *and* Rawling	*	170	9
Rayner *and* Powell		186	8
Rawlins's *Caſe*		277	1
	*	279	1
		425	9
		425	10
Rawleigh (*Sir* Walter) *his Caſe*	*	305	5
Randal *and his Wife's Caſe*		413	4

Re.

Renington's *Caſe*		170	3
Reeves *and* Winnington	*	175	12
Read *and* Hatton	*	177	23
Repps *and* Bonham	*	184	3
Redinge *and* Stoner		199	5
Reynel (*Sir* George) *his Caſe*		205	7
Reynolds (*Sir* G.) *his Caſe*		206	9
Read's *Caſe*		371	8
		372	9
		372	11
		372	12
		374	1
Rede *and* Beerlock	*	394	1

Ri.

Rice's *Caſe*		5	12
Ridgeway's *Caſe*	*	119	1
	*	119	2
	*	119	3
	*	119	4
		336	5
		336	6
Richardſon *and* Bernard		120	3
Richards *and* Sely		208	9
Ridly *and* Pownell	*	246	1
Richman *and* Garth	*	247	1
Riche's *Caſe*	*	255	1
Riſam *and* Goodwin	*	298	1
	*	305	4
Rigault *and* Carrick		326	4

Ro.

Roſs's *Caſe*		169	8
Robinſon *and* Miller		181	12
Roydon *and* Nelſon		186	8
Roberts *and* Piſing		333	1
Rodford *and* Hopkins		336	6
Roſe *and* Bartlet		364	6
Robinſon *and* Corbet		383	10

The Table of the Names of the Caſes.

Ro.

		Page	Pl.
Roskelly *and* Godolphin	*	386	7
Robſon *and* Francis		392	2
		392	3
Rogers *and* Danvers		393	14
Rock *and* Leighton	*	400	3
Robins *and* Barns		421	7
		421	9
Roper *and* Lloyd		429	7

Ru.

Rudge *and* Thomas	*	249	1
Rutland, (*the Counteſs of*) *her Caſe*		328	3
		328	4
	*	361	7
Rudyard *and* Hannington		416	19

Ry.

Ryding *and* Edwin	*	114	1

Sa.

Salkill *and* Howard	*	17	31
Sanchar (*Lord*) *his Caſe*		65	10
Saffin's *Caſe*	*	166	8
		166	14
Sanctum (Johannem) & Willielmum de Valencia		183	1
Savage (*Sir* John) *his Caſe*	*	241	8
Sale *and The Biſhop of* Coventry	*	246	1
Saint David (*Biſhop of*) *his Caſe*	*	293	4
Saint Johns *and* Grevill		308	1
Sayer's *Caſe*		344	5
Sams *and* Mercer	*	382	3
	*	384	13
	*	384	14
Saint John *and* Baudrip		391	13
Sands (*Sir* George) *his Caſe*	*	407	1
Sanderſon (*Sir* Nicholas) *and* Harriſon		428	5

Sc.

Scot *and* Peacock		118	14
Scarling *and* King		320	4

Se.

Seybrooke *and* Ball		159	2
Seygood *and* Hone		189	7
Seymor's *Caſe*		198	14
Seamain's *Caſe*		302	8

Se.

		Page	Pl.
Seymain *and* Greſham	*	302	9
Serjeant *and* Brook		321	3
		322	4
Seaborne *and* Savaker		326	5
Seymour *and* Greenvill		331	10
Sethe *and* Sethe		357	2
Seaman *and The Adminiſtrators of* Everard		384	15

Sh.

Shirley (George) *Knt. and Bart. and* Underhill		25	14
Shirley *and* Wright	*	121	6
		121	8
		121	9
Shaw *and* Weigh		178	26
Shard *and* Weigh	*	238	2
Shelley's *Caſe*		303	2
		425	10
Shutle *and* Wood		314	6
Shawe *and* Cuttereſſe		323	6
		337	11
	*	338	21
		338	22
		338	23
		360	5
Shaw *and* Cutters	*	338	21
Shreeves *and* Wrottam		367	1
Shawe *and* Huntley		377	10
Shrewsbury (*Earl of*) *and Sir* Walter Lewſon		381	4
Shaw *and* Norwood		391	17
Shaftoe *and* Powel		396	7
Shiply (Mary) *her Caſe*		398	1
		399	1
	*	401	7
		405	9

Si.

Simpſon *and* Mayhill	*	304	1

Sk.

Skipwith *and* Green		272	13
Skidmore *and* Winſton	*	381	9

Sl.

Slipper *and* Maſon		121	7
Slingsby (*Sir* Henry), *and* Lambert *and his Wife*		125	2
	*	349	3
Sleigh *and* Chetham	*	155	1
Slaughter *and* May		351	4
Sleddal *and* Bowerbank		386	11

The Table of the Names of the Caſes.

Sl.

		Page	Pl.
Slawny's *Caſe*		407	1
Slawning's *Caſe*		408	1

Sm.

		Page	Pl.
Smith *and* Bales	*	160	4
	*	244	2
Smye *and* Clown	*	187	1
Smartle *and* Williams	*	199	2
Smith *and* Abel		222	27
Smith *and* Villars		256	18
Smith *and* Yeomans	*	269	3
Smith *and* Smith	*	293	1
	*	356	11
	*	412	3
Smith *and* Norton		314	4
Smalcomb *and* Buckingham		319	9
		319	11
Smith *and* Bowles		329	1
Smith's *Caſe*		322	4
Smalwood *and The Biſhop of* Litchfield		361	4
Smalpeace *and* Smalpeace		383	9
Smith *and* Hannon		384	19
	*	394	1
Smith *and* Tracy	*	409	6
Smith *and* Strafford		418	7
Smith *and* Bonſal	*	423	3

So.

		Page	Pl.
Southcot's *Caſe*		117	5
		117	7
Southwell *and* Wade		135	1
		135	2
Soalle *and* Gerrard		181	15
South *and* Allen		200	8
	*	200	8
Southwell *(Chapter of) and Biſhop of* Lincoln	*	248	1
Southcot *and* Adams		267	7
Sonham *and* Trundle		295	4

Sp.

		Page	Pl.
Spicer *and* Spicer	*	177	21
	*	177	23
Sparks *and* Purnell		178	24
Spalding *and* Spalding		182	20
Springe *and Sir* Julius Cæſar		219	3
		228	2
Sparrow *and* Matterſon *& al'*		303	12
Spurſtow *and* Prince		361	3
Spark *and* Spark		367	3
Sparks *and* Croſts		387	15
Spencer's *Caſe*	*	393	7

St.

		Page	Pl.
Stephens *and* Elliot	*	165	3
Stephens *and* Hanham	*	166	16
Sturgion *and* Painter		208	7
Style *and* Herring		267	1
		267	2
		271	7
		271	8
Stanhope *(Sir* Michael) *his Caſe*		267	3
Stroud *and* Willis		270	16
Starling's *Caſe*		293	1
Sturton *(Lord) and* Pierpont		295	2
Stanford *(Earl of) and* Needham		303	13
Stamere *and* Amonye's *Caſe*		306	5
Startin, *and* Farmer *and* Lowton		360	2
Stapleton *and* Truelock		364	5
Stokes *and* Porter	*	370	11
	*	372	9
Stamford's *Caſe*	*	372	14
Stamp *and* Hutchins		387	5
Street *and* Wiſe		402	8

Su.

		Page	Pl.
Sutcliffe *(Dr.) and Sir* George Reynell		121	5
Sutton's *Caſe*	*	279	1
Sutton *and* Robertſon	*	418	1
		423	5
Sury *and* Piggot		420	13

Sw.

		Page	Pl.
Swifte *and* Aires		159	3
Sweeper *and* Sweeper	*	207	1

Sy.

		Page	Pl.
Symonds *and* Cudmore		196	10
		196	11
	*	198	11
Symond's *Caſe*		324	7
Sydenham *(Sir* George) *his Caſe*		343	2
	*	343	2

Ta.

		Page	Pl.
TAylor *and* Clerk *& al'*		115	6
Taylor *and* Sayer	*	182	19
Taylor *and* Fitzgerald		215	21
Taylor *and* Aſhe		230	3
		230	4
Talentine *and* Denton	*	243	1

The Table of the Names of the Caſes.

Ta.

		Page	Pl.
Talentine *and* Denton	*	247	1
Taylor *and* James	*	282	2
		283	6
		283	7
Taylor *and* Bekon	*	337	14

Th.

Thompſon *and* Leech		164	13
Thornton *and* Lucas		186	8
Thomas's *Caſe*		199	1
Thomaſin *and* Mackworth		202	6
Thredneedle *and* Lynham	*	245	2
Thompſon *and* Clerk		343	1
Thorold *and* Bayly	*	381	6
Thompſon *and* Butler	*	407	1

Ti.

Tilly *and* Collier	*	178	24
Tiſdale *and Sir* Will. Eſſex		207	1

To.

Tooke *and* Glaſcock		198	14
Tooker *and* Squier		207	1
		207	3
		231	10
Tooker's *Caſe*		220	5
Tompſon *and* Hunt		414	6

Tr.

Trollop's *Caſe*	*	290	4
Trevillian *and Lord* Roberts		336	8
Truſſel's *Caſe*	*	342	1
Trowbridge *and* Taylor		353	6
Treſham (Meriel) *her Caſe*		382	1
Trethewy *and* Ackland		413	1

Tu.

Turther's *Caſe*		128	12
Tuck *and* Frencham		236	1

Ty.

Tylor *and* Baker	*	118	15

Va.

Vane (*Sir* Henry) *his Caſe*	*	111	2
Vanthienem's *Caſe*		355	7

Ve.

		Page	Pl.
Veal *and* Prior		205	8
Veal *and* Roberts	*	213	13
Veal *&* al' *and* Read		222	25
	*	239	2
Vernon's *Caſe*		252	4
		252	5
Vernon *and* Boothby		241	8
Veal *and* Gateſden		413	3

Vi.

Viner *and* Eaton	*	295	4

Wa.

Wainwryght *and* Griffith	*	115	5
Waldoe *and* Lambert	*	116	1
Ward *and* Pettifer		160	7
Watt *and* Waſtfield		188	6
Wallop *and* Darby	*	189	8
Walgrave *and* Somerſet		234	6
Watkinſon *and* Man	*	244	1
Walker *and Sir* John Lamb	*	246	1
Walter *and The Dean and Chapter of* Norwich	*	248	1
Walker *and The Dean and Chapter of* Norwich	*	248	1
Walwin *and* Herbert		308	2
Walſal *and* Heath	*	321	5
Walthal *and* Aldridge	*	356	7
Walker *and* Walker		362	2
Wade *and* Atkinſon		381	6
Warner (*Sir* William) *and* Wainford		385	2
Waterhouſe *and* Woodſtreet	*	399	1
	*	401	7
Waldron *and* Berry		406	16
Wats *and* Crooke	*	409	6
Watſon *and* Packman	*	410	1
Warcup *and* Symonds		413	2
Wangford *and* Wangford	*	417	1
		418	9

We.

Weſtby's *Caſe*		114	3
Welden *and* Bridgwater		162	1
Wellock *and* Hammond		177	20
Webb *and* Herring		178	1
		179	3
		180	5
Welkins *and* Whiting		181	11
Web *and* Potter	*	192	4

The Table of the Names of the Caſes.

We.

		Page	Pl.
Web *and* Potter		192	8
Web *and* Paternoſter	*	230	4
Wever *and* Clifford		326	2
Wells *and* Denny		339	5
Wells *and* Somes		356	5
Woodward *and* Thompſon	*	381	9

Wh.

Whiting *and Sir* George Reynold	*	119	4
	*	121	5
Wheeler *and* Thoroughgood		166	10
Whiting *and* Welkin's *Caſe*		175	6
Whitlock *and* Horton	*	207	1
Whitingham's *Caſe*		218	4
White *and* Wiltſhire	*	302	10
Whitehall *and* Squire	*	373	3
	*	373	3
Whitmore *and* Porter		373	4
Wheeler *and* Collier	*	401	1

Wi.

Wingate *and* Morke		166	11
Winſmore *and* Hubbard	*	169	6
Wilſon *and* Robinſon	*	175	12
Wilkinſon *and* Meream		176	14
		176	15
		176	16
Widlake *and* Harding		176	17
Wild's *Caſe*		181	17
		182	18
		182	19
Wiſeman *and* Paſchal		201	5
Windham (*Juſtice*) *his Caſe*		213	13
Wilcocks's *Caſe*		216	2
Willoughby *and* Brook		270	18
Wildbore *and others*; *and* Prieſtland		327	9
Withers *and* Harris	*	330	8
		331	11
Withers *and* Hains		332	6
Williams *and* Curtis	*	338	21
		338	22
Williams *and* Cary	*	361	3
Wilkinſon *and* Thomas		370	15
Wilcox *and* Watſon		372	14
Williamſon *and* Norwich		386	12
Wilcox *and* Green	*	393	10
Wilſon *and* Packman		410	1

Wi.

		Page	Pl.
Wiſecot's *Caſe*		415	3
		415	4
		415	5
		415	7
		416	17
		418	2

Wo.

Worſly's *Caſe*		14	16
Wolf *and* Daviſon		122	7
	*	323	5
Wood *and* Ingorſal	*	174	2
	*	178	24
	*	237	1
Woodier *and* Greſham		309	8
Wotton *and* Shirt	*	321	5
Wood *and* Harburn		340	12
Woolley *and* Bradwell		360	5
Wootton *and* Cooke		363	4
Wolf *and* Hayton	*	369	4
Woodward *and* Darcy		377	12
Woodward *and* Thompſon	*	381	9
Woodcock *and* Foxe		392	1
Woodward's *Caſe*		417	3
Worlidge *and* Kingſwall	*	419	3

Wr.

Wrenford *and* Gyles		169	7
Wright *and* Wivell		200	7
Wren *and* Cecil	*	269	4
Wright (Margaret) *her Caſe*		308	1

Ya.

YAtes *and* Gough		309	5
		309	6

Ye.

Yeomans *and* Bradſhaw	*	353	4

Yo.

York (*Archbiſhop of*) *and* Morton	*	9	15
York *and* Allyn		304	2
		305	3
York *and* Twine		306	9

A N

AN INDEX.

Administration. Vide **Executor throughout.**

Bishop. Vide **Evesque.**

Conclusion. Vide **Estoppel.**

Devise what, and what Estate passes. Vide **Estate.**

Gaols. Vide **Prison.**

Escape.

WHAT, 113. pl. 1. Not so, if Party never in Prison or lawfully arrested, 113. pl. 1. Margent 120. pl. 1. Going at large in the same County, with or without a Keeper, 113. pl. 1, 2, *&c.* By Woman Gaoler marrying Prisoner, 113. pl. 6. Not after Sheriff's Death, 113. pl. 7. After new Sheriff made, tho' Notice not given him of the Prisoner, 113. pl. 8.

Who charged for it, 114. Serjeant and not Sheriff in *London*, if Escape on Process out of Sheriff's Court before brought to Counter, 114. pl. 1. Otherwise if on Process out of King's Bench, 114. pl. 2. By Sheriff against Prisoner that escapes, 114. pl. 1. Marg. Gaoler *de facto*, 114. pl. 1. Marg. Not Deputy, 114 pl. 1. Marg. Against old Sheriff omitting Prisoner in turn over, 114. pl. 3. Against Bailiff of the Liberty and not Sheriff, 114. pl. 4. If Bailiff unable, Lord must answer, 114. pl. 4. Marg. Against under Bailiff and not Gaoler, 115. pl 5. One Owner suffers Escape, all liable, 115. pl. 6. Against Gaoler as well as Sheriff for voluntary Escape, 115. pl. 6.

What will excuse it, 116. Rescue on mesne Process before brought to Prison, 116. pl. 1. Otherwise if on Execution, 116. pl. 2. Plaintiff's Consent by Parol, 116. pl. 1. Not if subsequent, 118. pl. 14. Not Rescue on mean Process after brought to Prison, 116. pl. 3. Taking Bail for Appearance, 117. pl. 4. If Prison broke by King's Enemies, 117. p. 5. Otherwise if by Rebels, *&c.* 117. p. 7. By Reason of Fire, 116. pl. 6. Where ordered to go at large by Lord Chancellor, Judges, *&c.* 117. p. 8. Wandering about on an *Habeas Corpus* no Excuse, 117. pl. 9. Prisoner on *Habeas Corpus* may be out of Custody for a small Time, if Writ performed by having him at the Day, 118. pl. 11, 12.

Escape with Consent of former Gaoler no Excuse, if returned and suffered to escape by Successor, 118. p. 13. Taking mortgage for the Money no Excuse, 118. pl 15.

Fresh Pursuit, what, and where taking thereon will excuse Escape, 119. pl. 1. Not if Action be before brought, 119. pl. 2, 4. May be so tho' Prisoner out of Sight for two or three Days, 119. pl. 3.

Where Officer charged for an Escape, 120. pl. 1, 2, *&c.* Tho' Process erroneous if awarded by Court, 120. pl. 2. But otherwise if the Entry be only, that *A. prosecutus fuit, &c.* 120. pl. 2. Diversity where Cause appears to arise out of Jurisdiction, or not, where Escape on Process out of inferior Court, 120. pl. 3. If two jointly taken in Execution and one escapes, Sheriff charged with the Whole, 120. pl. 4. So if Baron and Feme charged, and Feme escapes, 125. pl. 5. Charged tho' Process erroneous, but not if Judgment on

which, &c. reverſed, 121. pl. 6. For an Eſcape on a Writ of *Excommunicato capiendo*, 121. pl. 7. For an Eſcape on Commitment by Commiſſioners of Bankrupts, 120. pl. 1. Margent, 122. pl. 6. Diverſity where Term intervenes between Teſte and Return of a *Capias ad Satisfaciendum*, and of *Capias ad reſpondendum*, 121. pl. 8, 9. Where Eſcape after Plaint entered, or Writ delivered to Sheriff againſt one in his Cuſtody, &c. 121. pl. 9, 10, 11.

Where in Execution by taking on *Capias pro Fine*, *Capias utlegat'*, &c. 122. pl. 1, 2.

Reſpondeat Superior, 124.

Pleader Declaration, 125. Varianee from the Record, 125. pl. 2. In declaring on Eſcape on *Capias ad Satisfaciendum*, muſt ſhew the Judgment, 125. pl. 3. Where after the Commitment in Execution ſhewed, the Concluſion muſt be *prout patet per Recordum*, 125. pl. 4. *Nul tiel Record*, 121. pl. 6. 126. pl. 1. Taken on freſh Purſuit upon an Eſcape at another Place pleaded without traverſe of the Place where laid, 126. pl. 2. Tho' Eſcape laid to be voluntary, yet freſh Purſuit pleaded without traverſe of the Voluntarineſs, 126. pl. 3.

Eſchange or Exchange.

Not of lay Hoſpital for Spiritual, 127. pl. 1, 2, 6. By Husbands and Wives good during Coverture, 127. pl. 1. By Infant, binds till defeated, and he may make it good by Agreement when of Age, 127. pl. 3, 4. So may Feme Covert by Agreement after ſole, 127. pl. 6, 8. 128. pl. 9. Confirmed by Infants continuing Poſſeſſion after of Age, 128. pl. 11. So by Succeſſor of Parſon *quoad* him before the Statute of 13 *El.* 128. pl. 12. Not ſo ſince the 13 *El.* 128. pl. 13. By Tenant in Tail good till avoided by Iſſue, 128. pl. 1, 2. But if he hath Aſſets deſcended, he ſhall not avoid the Warranty, 128. pl. 3. Between Tenant in Tail and Husband ſeiſed in the Right of his Wife, good till avoided, 128. pl. 5. So of Lands of a defeaſible Title for thoſe of an indefeaſible, 128. pl. 6.

Of what Things of Rent for Land, 129. pl. 1, 10. Common for Land, 129. pl. 2, 11. Tenure by Divine Service for Temporal Seigniory, 129. pl. 3. Common for Tithes, pl. 4. Not Annuity for Land, pl. 6. Villain for Land, pl. 7. 131. pl. 9. Reverſion for Lands in Poſſeſſion, pl. 8. 131. pl. 12. Releaſe of Right in Lands in Exchange for other Lands, 129. pl. 12, 13. Only of Things in *eſſe* before, 130. pl. 1. But not a Rent *de novo* in Exchange for other Land, 130. pl. 2. Rent reſerved for Equality of the Exchange, 130. pl. 1. 132. pl. 5, 6. Where the Eſtates muſt be equal tho' not Value, 130. pl. 1. Not of Land for Life for Land in Fee, 130. pl. 2. An Eſtate for Life of Donee for Eſtate *pur autre vie*, pl. 5. Not Eſtate for Life for baſe Fee, 130. pl. 6. Baſe Fee for abſolute Fee, 130. pl. 7. Two Jointenants for Lands given them in Common, 131. pl. 13. Two give Lands to one for Lands by him given them. 131. pl. 14. Between Tenant for Life and Tenant in Tail after Poſſibility, 131. pl. 15.

Not without the Word *Exchange*, 131. pl. 1. 132. pl. 7. Without Deed where the Lands lie in one County, 131. pl. 1. Otherwiſe if in Two, 131. pl. 2. So if Land in *Ireland* for Land in *England*, 131. pl. 3. Muſt be by Deed if the Thing lies in Grant, tho' in one County, 132. pl. 4. By Fine, 132. pl. 8.

Execution thereof muſt be of Churches during the Lives of both Parties. 132. pl. 1. And if one Party dies before Induction the Exchange is void, 132. pl. 2. Muſt be by Entry or Claim during the Party's Life, 132. pl. 3. Exchange of Churches executed by Preſentation of their Patrons, Admiſſion, &c. 132. pl. 2. Not executed till they are inducted, 133. pl. 3. Perfected by Infant's Continuance in Poſſeſſion after he comes of Age, 133. pl. 4. By Exchange without limiting any Eſtate they have but for Life, 133. M. 1.

How defeated by Eviction of Part by prior Title, 133. pl. 1, 2. So if a Freehold or Term of Years therein only be evicted, 133. pl. 3. Not by wrongful Entry by Party, 134. pl. 1. Or Stranger, 134. pl. 2. Otherwiſe if by Party on Title, as if Infant, &c. 134. Or by Stranger on Title 134. pl. 4. Not by Determination of

of the Eſtate given in Exchange, 134. pl. 5, 6, 7. Not by Accident after the Exchange, 134. pl. 8. Not by Releaſe of the Warranty created on the Exchange, 134. pl. 9. *Excambium* imports a Condition to give an Entry to avoid Exchange, or a Warranty to have a Recompence, 134. p. 10. Defeated by Eviction, tho' Party before Exchange had Notice of prior Title, 134. pl. 11. Parties and their Heirs may avoid it upon Eviction, but not Stranger, 134. pl. 12, 13, 14.

Eſcheat.

In what Caſe, 135. Not if Corporation grants over, and are after diſſolved, 135. pl. 1, 2. Otherwiſe if not before granted over, 135. pl. 3, 4. Not of Rent for Want of Heirs, but it ſhall be extinct, 135. pl. 5. If Advowſon granted to one and his Heirs, who dies without Heirs, the the Grantor ſhall have it, and if not the King as ſupream Patron, 135. pl. 6. *Per defectum ſanguinis* or *delictum tenentis*, 135. pl. 7. On Attainder of Felony to Lord for Want of Tenant by Reaſon of Corruption of Blood, but if of Treaſon, to King as an immediate Forfeiture, and not as an Eſcheat, 135. pl. 7. Lands held of an Honour coming to King for Want of an Heir, or for Felony, are Part of the Honour, otherwiſe if for Treaſon; and if King grants them over, they are held of him in Chief, and not of the Honour, 135. pl. 8, 9. But if one ſeiſed in Fee of a Market, *&c.* not holden is attainted of Felony, the King ſhall have the Profits for his Life, and they are after extinct, 135. pl. 10. A Right of Action ſhall not, 136. Margine. Not where the Lord hath a lawful Tenant, 136. As if Diſſeiſor makes a Feoffment, and after Diſſeiſee dies without Iſſue, 136. pl. 1. Or after Diſcent caſt, 136. pl. 3. Tho' Lord not ſeiſed of Services within the Time of Limitation, 136. pl. 4. Diverſity where Infant, *&c.* makes Feoffment in Perſon, or by Letter of Attorney, and after dies without Iſſue, 136. pl. 5, 6.

Who ſhall take Advantage of it, 136. Tenant for Life, *&c.* of a Manor, and after his Death, *&c.* he in Remainder, for it comes in Lieu of the Seigniory, 136. pl. 1.

How prevented, 136. By Acceptance of Homage or Fealty, 136. pl. 1. Otherwiſe of Rent, for that may be by Bailiff, 136. pl. 3. Not by Acceptance of Rent from Diſſeiſor after Diſſeiſee died without Heir, otherwiſe if he avows for it, 136. pl. 3. 137. pl. 4. By Acceptance of Rent from the Feoffee of Diſſeiſor, 137. pl. 5. Not avoided by Attainder of Treaſon after attainted of Felony, 137. pl. 6. By Reverſal of Attainder of Principal Eſcheat by Attainder of Acceſſary avoided, 137. pl. 7.

Eſcheator.

His Duty and Office, 138. pl. 1. How many, 138. pl. 2.

Eſſoign.

Diſallowed, and for what Cauſe, 139. Not becauſe Attorney ſeen in Court, 139. pl. 1. By Appearance of Party in Court after caſt, 139. pl. 2, 3. By Barons being in Court after caſt for Baron and Feme, 139. pl. 4, 5. For Removal of Attorney before Eſſoign adjourned, 139. pl. 6. Eſſoign *ultra mare* diſallowed, becauſe ſeen in *England*, *&c.* 139. pl. 7. Eſſoign *de malo lecti* diſallowed, if Tenant not ſick indeed, 140. pl. 8. Where two Attornies in one Plea, and one only eſſoigned and adjourned, no challenge for this after, 140. pl. 1. Where Baron and Feme ſeverally eſſoigned, tho' diſallowed for one may remain for the other, 140. pl. 1, 2.

The ſeveral Sorts of Eſſoigns.

What Perſon ſhall have it, 141. Not Corporation aggregate, 141. pl. 2. Not Attorney where Party himſelf ought to appear, 141. pl. 3, 4. Not Party where he hath an Attorney, 141. pl. 5. Unleſs Attorney eſſoigned alſo, 141. pl. 6, 7, 8. But otherwiſe if eſſoigned *de malo lecti*, which is only in a Writ of Right where none can join the Miſe on the meer Right but the Maſter only, 141. pl. 11. Wife not eſſoigned if Husband makes Default, otherwiſe ſhe may, 141. pl. 12, 13.

Where

Where Variance between Warrant of Eſſoign and Writ quaſhed, 141. pl. 13, 14, 15. Eſſoign of King's Service, 142. Woman *quia nutrix* of King's Child, 142. pl. 17. 145. pl. 1. *Quia lotrix* of K. 142. pl. 17. Becauſe Carver of K. 142. pl. 18.

Who eſſoigned prayees in Aid, 142. pl. 1. Attorney, 142. pl. 1, 2, 3. If Two, both ought, 142. pl. 4, 5. Otherwiſe if the Warrant in the Disjunctive, 142. pl. 6. Not Attorney where Maſter ought to do his Law, 142. pl. 7. Husband and Wife may have ſeveral, 142. pl. 8.

At what Time, 143. Tenant after Vouchee before he hath entered into Warranty, pl. 1, 2, 3. Tenant may at Return of *Venire* to try the Deed of Warranty, 143. pl. 4.

For a collateral Reſpect, 143. Where in Priſon or by Mainpriſe, 143. pl. 1, 2, *&c.* Plaintiff may be after Defendant appears by *Cepi Corpus*, 143. pl. 4. Not Plaintiff after he hath imparled to another Day in ſame Term, 144. pl. 5. So if to another Term, 144. pl. 6. So if Defendant had imparled to another Term, he could not then, 144. pl. 7. But if Day given to Parties to another Term, eſſoigned then, 144. pl. 8. Not when ſeen in Court, 144. pl. 9. If Writ by ſeveral *Præcipe's* againſt Three, Plaintiff cannot be eſſoigned againſt one, and appear in Perſon againſt the others, 144. pl. 10. Nor by Attorney, 144. pl. 11. Wife eſſoigned tho' Husband makes Default, 144. pl. 12. So if Husband appears, 144. pl. 13. Plaintiff eſſoigned, tho' he hath not found Pledges, 144. pl. 14. Plaintiff eſſoigned tho' Original returned *tarde*, 144. pl. 15.

Againſt whom it lies, 144. For Tenant in *Quare impedit* by King, 144. pl. 1. So in a Writ of Right by King, 144 pl. 2.

Where upon a Reſummons, or not, 145. pl. 1, 2.

By whom caſt, 145. Common Eſſoign, tho' no ſuch Perſon as caſts it, 145. pl. 1, 2. Otherwiſe as to eſſoign *de ſervitio Regis*, for he ought to avow it, 146. pl. 3. To ſwear it true, 146. pl. 1. And his Name to be entered, 145. pl. 3, 4. By Infant, 145. pl. 5. Common Eſſoign not caſt by Party in Perſon, 145. pl. 1. Not by one in Mainpriſe for himſelf, 146. pl. 2. Eſſoign *de malo lecti* by Two, 146. pl. 4. Entry thereof, how to be made, 146. In *Præcipe* for Rent entered *in placito terræ*, 146. pl. 1. In Diſceit *in placito tranſgreſſionis*, 146. pl. 2, 3, 4. *In Rationabili parte bonorum in placito debiti*, 146, pl. 5. So in a Writ of Annuity, 146. pl. 6. In a *Recordari in placito detentionis averiorum*, 146. pl. 7.

Common Eſſoign lies in Dower, 147. pl. 1. No Eſſoign in judicial Writs, 147. pl. 2. Not in *Scire facias*, 147. pl. 3. Nor in *Venire facias*, 147. pl. 4. 148. pl. 16. After a Protection allowed for Defendant and repealed, 147. pl. 5. So in a Reſummons in a Plea of Land, 147. pl. 6. 150. pl 6. In *Quare impedit*, 147. pl. 8, 9. Not in Aſſiſe, 147. pl. 10. But does in a Writ of Entry in Nature of an Aſſiſe, 147. pl. 11. Not in a *Quem redditum reddit*, 147. pl. 2, 12. Not in an Aſſiſe of *Mortdanceſtor*, 147. pl. 13, 14, *&c.* In a Writ of Right, 148. pl. 18, 19.

De ſervitio Regis, not in a *Quare impedit*, not in Aſſiſe of *Novel Diſſeiſin*, *&c.* for the long Delay which may come thereby, 148. pl. 20, 21, *&c.* Not in a Writ of Eſtrepement, 148. pl. 23. Not in a *Quare non admiſit*, 148. pl. 23. In a Writ by Journeys Accounts tho' eſſoigned in the former Writ, 148. pl. 25. The Appealor not eſſoigned, 148. pl. 26.

At what Time after every Appearance, 148. pl. 1, 2, *&c.* after the Prayees in Aid have been eſſoigned, 149. pl. 5. Not by Enfant after Proceſs awarded to bring him in to be viewed, 149. pl. 6. Not at the Day given to wage his Law, 149. pl. 7. Upon the Return of the Exigent in Debt, 149. pl. 8. Vouchee upon the Return of the Summons *ad warrantizandum*, 149. pl. 9. After Demurrer at the Day of Adjournment, 149. pl. 10. At the fourth Day adjudged and adjourned, 149. pl. 11. Where at the Day in Bank Judgment is not given but adjourned till next Term, whether the Tenant can be eſſoigned, 149. pl. 12. For the Demandant it ought to be caſt the firſt Day of the four, 149. pl. 1, 2.

pl. 1, 2. Unleſs by Aſſent of Parties, 149. pl. 3. But Tenant may be at 4th Day, becauſe not bound to appear before, 149. pl. 4. But in a Formedon if no Eſſoign caſt firſt Day, it cannot be after, for the Tenant is then demandable, 150. pl. 6. Where in Dower after Demandant hath entered her Exception, 150. pl. 8. Not by him that prays to be received if Reſceit counterpleaded till tried, 150. pl. 6. But after Reſceit may, 150. pl. 2, 3. Vouchee upon Return of *Summoneas*, *&c.* before Entry into Warranty, 150. pl. 4. But not if Writ returned *tarde*, 150. pl. 5. Where after *Venire* returned, 150. pl. 7, 8, *&c.* Where after a *Petit Cape*, 151. pl. 12, 13.

Eſſoign after Eſſoign not common one immediately after another, 151. pl. 14, 16. Nor *de ſervitio Regis* after a Common one, 151. pl. 17, 18. After Proceſs intermediate, 151. pl. 19, 20, 23, 24. After Reſummons, 151. pl. 21. So if Parol put without Day for other Cauſe, 151. pl. 22. Tho' Tenant caſt Eſſoign between him and Demandant, yet he may between him and Vouchee, unleſs actually entered into Warranty, 151. pl. 25. Where firſt null, ſecond good, 152. pl. 26. But one Eſſoign after Iſſue, 152. pl. 27. Not in Writs of Aſſiſe, *&c.* after Appearance, 152. pl. 28. At the firſt Day after Iſſue joined, 152. pl. 29.

Trial of an Eſſoign, 153. Eſſoigner no Party to try it, 153. pl. 2, 3, 4. But if Eſſoign challenged, becauſe ſeen in Court, it ſhall be tried immediately, 153. pl. 3.

Adjournment and Proceedings thereon, 153. pl. 1. Adjudged and adjourned, 154. pl. 2, 3. Where Eſſoigner to be ſworn, 154. pl. 1, 156. pl. 5. Where Eſſoign muſt be warranted, 154. But need not at the firſt Day, 154. pl. 6. 155. pl. 2. Nor after a Reſummons, 154. pl. 7. Where Tenant may plead a Releaſe of all Right without warranting Eſſoign, 155. pl. 8. That it ought to be warranted at the Day he hath by the Eſſoign, 155. pl. 1. Where Demandant being eſſoigned brings not his Warrant, he ſhall be nonſuited, 155. pl. 5. Where for Want of a Warrant Plaintiff ſhall be recompenſed in Damages, 155. pl. 6. Demandant not appearing at the Day to which the Tenants Eſſoign is adjourned nonſuit, 155. pl. 7.

Entry of Eſſoign between the Demandant and Tenant, 156. pl. 1, 2.

Each Tenant may have one Eſſoign, 157. pl. 1, 2. But not againſt each Demandant ſeverally, 157. pl. 2. Fourcher, 157.

Eſtate.

By and to whom made, not to Party himſelf who gives, 158. pl. 1. Nor to his Heir, pl. 3, 4. Not to one for Life reſerving to himſelf a Tail, 158. pl. 5, 6. Nor to one for Life reſerving Remainder to the Heir Male of his Body, 158. pl. 7. But if Feoffment made to himſelf, Remainder to the Heirs of his Body, it is a good Tail executed in himſelf, 158. pl. 8. But a Remainder limited to his Heirs is void, and he hath a Reverſion, 159. pl. 9.

Freehold not to commence at Day to come, as if one makes a Feoffment from the Day of the Date, and Livery *ſecundum chartam*, 158. pl. 1, 2. So in Caſe of Grant of Tithes, 158. pl. 3. But if one Leaſes for Life *habendum* from the Day of the Date, and himſelf makes Livery the next Day *ſecundum formam Chartæ*, it is good, 160. pl. 4. Where Livery by Attorney, pl. 5. If *a Die datus*, and not delivered till Day after, *&c.* it is good, 160. pl. 6. One grants the Mowing of his Meadow from a Day to come, 160. pl. 7. So if 18 Acres, Part of his 100 Acres at Election for Livery, cannot wait till, *&c.* 160. pl. 8. So Reverſion on Leaſe for Years not grantable from Day to come, 161. pl. 9. And Grant of Lands by *Habend. a Die confectionis*, *&c.* void, 161. pl. 10. So Parſon cannot grant his Tithes for his Life, *habend.* from Day to come, 161. pl. 11. So Office of Inheritance cannot; otherwiſe of Office only grantable for Life, new Office or Rent, 161. pl. 12.

Moveable Fee, 162. pl. 1, 2, *&c.*

Where uncertain Intereſt is Freehold or not, 162. pl. 1, 2, *&c.*

In one before Entry or Claim by Bargain and Sale or Limitation of Uſe

to attorn, aſſign, &c. but not to bring Treſpaſs, 163. pl. 1. Where Freehold in Law not actual, as upon a Diſcent, 163. pl. 2. Fine, 163. pl. 3. Not upon an Exchange, 163. pl. 4. Partition, 164. pl. 5. Upon a Surrender, 164. pl. 6. 12, 13. Not upon a Livery within View, 164. pl. 7. Where before Agreement to the Eſtate, 164. pl. 9, 10. In Remainder after particular Eſtate determined, 164. pl. 11.

Poſſeſſion to leaſe, give, &c. Diverſity as to Leſſor, where Leaſe for Years to be void, and where that Leſſor may re-enter, 165. pl. 1. Not in Diſſeiſee to leaſe put in Common, &c. 165. pl. 2. Tho' he ſeals and delivers Leaſe and orders another to enter on the Land, and deliver it there, 165. pl. 3. So if Corporation diſſeiſed fixes their Seal to a Leaſe and by Letter of Attorney orders one to enter on the Land and deliver it there, 165. pl. 4. But otherwiſe if Diſſeiſee delivers it as an Eſcrow, and orders one to enter on the Land and deliver it as his Deed, 165. pl. 5, 6. Diſſeiſee may make a Deed of Feoffment with a Letter of Attorney to one to enter and deliver Seiſin, 165. pl. 7. Where Tenant for Years not being in Poſſeſſion, may grant, 166. pl. 8, 9, 10, &c. where one may leaſe tho' he hath a Tenant at Sufferance, 166. pl. 12. Where one was diſſeiſed or not at his Election, 166. pl. 15. After *Liberate*, Conuſee cannot aſſign if Conuſor continues Poſſeſſion, 166. pl. 16.

Eſtate void without Entry or other Act, Diverſity where Leaſe made by Husband after Iſſue, and where by Husband and Wife, 167. pl. 1. Diverſity between leaſe for Life and Years by Parſon, 167. pl. 3, 4. Diverſity between Leaſe for Life and Years, 167. pl. 5. Where he that is in Poſſeſſion needs make no Claim, 168. pl. 9, 10, &c.

Limitation of a Term not to one and the Heirs of his Body, 168. pl. 1, 2. Tho' Leaſe for Years made by one Jointenant for Life binds Survivor, yet if the other Surrenders and Leſſor dies, it is determined, 169. pl. 3. If Termor deviſes the Land, the Intereſt of Deviſee determines not by his Death, 169. pl. 4. So in caſe of Deviſe of a Rent-charge out of it, 169. pl. 5. Where Grant void as to Two ſhall not be taken as a Limitation of the Eſtate of another, 169. pl. 6. Leaſe for twenty-one Years, if Leſſee continues ſo long in Service of Leſſor, determines not by Death of Leſſor, being Act of God, 169. pl. 7. Leaſe to one during his own Life and the Lives of others, good, 169. pl. 8. Deviſe of Term to *A.* for Life, and after to *B.* for Life, determines by the Death of both; otherwiſe if given to *B.* generally, 170. pl. 9.

By what Act Limitation determined. Leaſe for Years, if Two live ſo long, by Death of one, otherwiſe of Leaſe during two Lives, 170. pl. 1, 2. 171. pl. 9. Otherwiſe if limited during Time *A.* and *B.* ſhall be of the *Temple*, 171. pl. 8. Uſe limited to *A.* for Life, and after to his intended Wife, during and until ſome Son attain twenty-one, and after, ſo as ſhe continues a Widow, and they have no Son, and he dies, yet ſhe may enter, 170. pl. 14. To one and his Heirs, *donec A.* pays 100 *l.* and *A.* dies, the Eſtate continues, 171. pl. 5. Where *Proviſo* that if Leſſees die during Term, &c. and one dies not determined, 171. pl. 6. Eſtate ſo long as *B.* hath Iſſue Male, determined by Death of *B.* tho' his Wife *enſeint*, &c. 171. pl. 9. Deviſe to one during his Exile, &c. 171. pl. 10. To one and the Heirs of her Body, provided ſhe marries a *Searl*, and ſhe marries another, yet not determined, becauſe ſhe may ſurvive and after marry a *Searl*, 171. pl. 11.

Fee by what Words, to a Man and his Heir, 172. pl. 1. To the eldeſt Son and the Heirs of his Father, the Son hath a Fee, 172. pl. 3. To a Man and his Succeſſors but for Life, 172. pl. 4. To an Abbot and Convent, 172. pl. 1. But to a Biſhop, Parſon, &c. but for Life, 172. pl. 2. To Corporation aggregate Fee, without naming Succeſſors, 172. pl. 3. To a Church Fee in Parſon and Succeſſors, 173. pl. 4. To a Parſon in Frankalmoigne, 173. pl. 5, 6. Grant by Feoffee as fully as he was enfeoffed, 173. pl. 7. Remainder limited to Heirs of *J. S.* 173. pl. 8. To K. is Fee, 173. pl. 9. To Two *& hæredibus* but for Life for Uncertainty,

tainty, 173. pl. 1. So tho' Clauſe of Warranty to them *& hæredibus ſuis*, 173. pl. 2. Rent reſerved on Tail to Donor and his Heir, Fee, 173. pl. 3. Otherwiſe if reſerved on Leaſe for Life, 173. pl. 4. To one *& hæredibus*, Fee, 173. pl. 5. To one or his Heir, is but for Life, 174. pl. 6.

Fee by Deviſe to his Wife for Life, and after to his three Daughters, is but for Life to them, 174. pl. 1. Otherwiſe if ſaid if one dies, the other to be Heirs to her, 174. pl. 2. To *A.* for Life, and after to *B.* except *A.* purchaſe other Lands for *B. &c.* is Fee, 174. pl. 3. So if by Will one appoints Lands to be purchaſed for his Sons, it muſt be in Fee, 174. pl. 4. Deviſe of Lands to one, and that he ſhall pay for it 10 *l.* Fee, 174. pl. 5. Diverſity where to one for ever, and where to one for Life for ever, 175. pl. 6. To one to ſell, 175. pl. 7. Fee-ſimple deviſed to *A.* for Life, and after to *B.* is Fee in *B.* 175. pl 8. To one and his Aſſigns is but for Life, but to him and his, a Fee, 175. pl. 9. To one *& ſanguini ſuo*, Fee, 175. pl. 10. Of all his Eſtate a Fee, 175. pl. 12. 176. pl. 16. To his Sons and Daughters equally to be divided is but for Life, 175. pl. 13. After Deviſe of Leaſes he deviſes all the Reſidue of his Eſtates, Goods, *&c.* to his Executors, 176. pl. 14, 15. All my Inheritance, 176. pl. 17. One Houſe deviſed to *A.* and his Heirs, another to *B.* and his Heirs, and if either of them died without Iſſue, the other to have *totam illam partem*, and *A.* dies without Iſſue, *B.* ſhall have but for Life, 176. pl. 18. Each other's Heir makes a Fee, 176. pl. 10. 178. pl. 24. Paying collateral Sum makes a Fee; otherwiſe if out of the Eſtate, ſo that Deviſee cannot be a Loſer, 177. pl. 20, 21, 23. But a Deviſe to one to the Intent that with the Profits he ſhould pay, *&c.* is but for Life, 177. pl. 22. Diverſity where Deviſe to diſpoſe of at Pleaſure, and where to one for Life, and after to diſpoſe of at Pleaſure, 178. pl. 25. Deviſe upon ſuch Truſts as may continue for ever, makes a Fee, 178. pl. 26. Deviſe to one paying Rent for ever, makes Fee in Land, 179. pl. 9.

Tail by Deviſe, to one and her Heirs, and if ſhe dies without Iſſue, Remainder to, *&c.* is Tail, 179. pl. 1. Otherwiſe if to one and his Heirs, and if he dies without Iſſue, living *A.* to *A.* 179. pl. 2. To one *& ſemini ſuo*, 179. pl. 3. Deviſe to one Son and his Heirs, and of other Land to another Son and his Heirs, provided, that if either died before Marriage, or before twenty-one, and without Iſſue, *&c.* No Tail but Fee on the Contingency, 179. pl. 4. To one and his Heirs, Remainder to another who is his Heir Tail in firſt, 180. pl. 5, 6. To his three Daughters, and if they die without Iſſue, to a Stranger, Tail, 180. pl. 7. Otherwiſe if only that one ſhall be Heir to the other, 180. pl. 8. To one for ever, and after his Death to the Heir Male of his Body for ever, and for Want thereof, *&c.* Tail, 181. pl. 11. Diverſity where deviſe to one, and where to one for Life, and if he dies without Iſſue, 181. pl. 12, 16. To one for Life, Remainder to the Sons of his Body, he hath but for Life, 181. pl. 13. To one and his Heirs Male, Tail, 181. pl. 14. To one and his Heirs, and if he die within Age, or without Iſſue, then, *&c.* Tail, 181. pl. 15. Deviſe to one and his Wife, and after their Deaths to their Children; Diverſity whether they then had Children, or not, 181. pl. 17. 182. pl. 19. But to one and his Children, Tail, whether he hath any, or not, 182. pl. 18. Where no Intention to diſinherit, 182. pl. 20. To one and the Iſſue of his Body by a ſecond Wife, Tail, 182. pl. 21. To his Wife for Life, if ſhe don't marry, and if ſhe marries, *B.* ſhall enter preſently, and hold to him and the Heirs of his Body, and ſhe dies, *B.* hath Tail, 182. pl. 22. Where Words of Limitation in a Will not tacked to an Eſtate for Life in Settlement, ſo as to make Tail, 182. pl. 23. To *A.* for Life, and if he hath Iſſue Male, to ſuch Iſſue and their Heirs, if not to *B.* in Fee, *A.* hath but for Life, the Fee is to veſt on the Contingency, 183. pl. 24.

Tail or Fee by Deed, to one and his Heirs on the Body of his Wife, Tail, 183. pl. 1. So if to his Heirs on the Body of another Woman, 183. pl. 2.

To

To the Husband of *A.* and the Wife of *B.* and the Heirs of their Bodies, Tail, 183. pl. 3. But to two Husbands and their Wives, is a joint Eſtate for Life, and ſeveral Inheritances, 183. pl. 4. To a Man and two Women, and the Heirs of their Bodies, 184. pl. 5. Gift in Tail to a Man and his Siſter, *&c.* ſeveral Inheritances, 184. pl. *6.* To one and the Heirs Male of his Body, and to him and the Heirs Female of, *&c.* the Tail in Males preferred, 184. pl. 7.

Tail, by what Words, by Deed, Heirs neceſſary, becauſe Fee at Common Law, but need not be *de corpore*, for *de ſe* is ſo, 184. pl. 1. So where raiſed by Way of Uſe, 184. pl. 2. In him or her to whom Heirs limited, 184. pl. 3, 4. To Son and to the Heirs of the Body of his late Father, and other odd Limitations as to the Body of, *&c.* 185. pl. 5, 6, *&c.* To the Heirs of the Body of *A. in poſterum procreand'*. 185. pl. 9. To one and his Heirs Male lawfully begotten, a Fee, 185. pl. 10, 11. To *A.* and his Wife, *habend.* to them to the Uſe of them, and the Heirs of their Bodies, Tail, 185. pl. 12. To the Uſe of *A.* and his Heirs, and for Want of Iſſue of *A.* to, *&c.* Tail, becauſe it ſhews what Heirs intended, as if to one and his Heirs, *viz.* Heirs of his Body, 185. pl. 13. Limitation of an Uſe upon a Copyhold, Surrender conſtrued as a Deed as to Tail, 186. pl. 14.

Tail of what; not of Term, 186. pl. 1. Or of Thing not concerning Land, 186. pl. 2. Not of Annuity, 186. pl. 3. Of Titles taken from Places, 186. pl. 4. 187. pl. 11, 12. Of Offices concerning Freehold, as Bailiff of a Manor, 186. pl. 5, 6, 7. Of Copyhold, or not, 186. pl. 8, 9. Where Gift in Tail with Warranty, that is alſo intailed, 187. pl. 10.

Tail, by what Word, *habend.* conſtrued to explain what Heirs before intended, 187. pl. 3. 188. pl. 4, 5, 6. Diverſity where *in forma præd.* and where *in eadem forma*, 188. pl. 8.

Tail by Implication in Deviſe, 188. pl. 1, 2, 3, *&c.* 8. Not by Implication upon Surrender of a Copyhold, 189. pl. 7.

Tail, how barred, 190. pl. 1, 2, *&c.*

Tail at Common Law, 190. pl. 1. Where to Husband and Wife and the Heirs of their Bodies, the Huſband alone after Iſſue could not have barred, 190. Z. 1. Where Donee might have barred his Iſſue, or Poſſibility of Donor, 191. pl. 1, 2, *&c.* King no further Power than other Donee, 191. pl. 5. But Poſſibility in King Donor not to be barred, 191. pl. 6.

Frankmarriage, how created by the Words *in liberum Maritagium*, without Heirs, 191. B. 1, 2, *&c.* Donees muſt hold of Donor, 192. pl. 4. Muſt be in Conſideration of Marriage, and to or with one of the Blood of Donor, 192. pl. 5, 6.

Special Tail to a Woman and Heirs of her Body, provided ſhe marries and hath Iſſue by one named *Searl*, 192. C. Margine.

Tail, Deſcent at Common Law not to collateral Iſſue, 192. pl. 1. And where to one and his Heirs Male of his Body, a Female could not inherit, 192. pl. 2. Where Iſſue by ſecond Husband might have inherited, 192. pl. 3. Where one may have by Tail that is not Heir of the Body of the Donee, 193. pl. 1. Son of Daughter ſhall not inherit where Deviſe to one and the Heirs Male of his Body, 193. pl. 3.

Charges by Tenant in Tail, void againſt his Iſſue, 193. F. 1, 2, *&c.* not where Rent granted in Conſideration of a Releaſe of Right to the Land, 194. G. 1, 2. So not if granted in Performance of Condition annexed to the Eſtate, 194. pl. 3, 4. Or in Lieu of Dower, to which a Woman is intitled, 194. pl. 5. Void as to one and not another, as Leaſe by Tenant in Tail void againſt the King, but voidable only as to Iſſue, 195. pl. 1. Void againſt Reverſioner, but voidable only againſt ſuch who claim under the Tail, 195. pl. 2, 3. Such Leaſes avoided by the Alienee, *&c.* of the Iſſue, 195. pl. 4, 5, *&c.* Leſſee of Tenant in Tail bound by Verdict againſt Tenant in Tail, 196. pl. 8. Thoſe that claim under Tenant in Tail bound by his Charge, 196. pl. 9, 10, *&c.* void and voidable by his Death, Grant of next Avoidance void, 196. pl. 1. Leaſe to commence at a Day to come, void-

voidable, 196. pl. 2. Where Tail barred, not to be avoided, 197. pl. 3. Grant in Fee by Tenant in Tail of a Rent voidable by Iſſue, 197. pl. 6. Of a Rent out of the Land intailed, void, 197. pl. 7. Covenant by Tenant in Tail to ſtand ſeiſed to the Uſe of himſelf for Life, Remainder, *&c.* void, 197. pl. 8. Diverſity between future Leaſe by Tenant in Tail, which may poſſibly commence in his Life, and where to begin after his Death, 198. pl. 10, 11. But if Leaſe and Releaſe to the Uſe of himſelf for Life, Remainder, *&c.* good till avoided, 198. pl. 13. So if Bargain and Sale in Fee to another, good till avoided, 198. pl. 13.

Grant to Corporation for their Lives, Fee, otherwiſe if granted for the Life of the Leſſor, 198. pl. 1, 2.

Eſtate for Life by Implication in Deviſe, not where *Proviſo* to permit one to enjoy for Life, 199. pl. 1. Diverſity where the Deviſe is to the Heir after the Death of his Wife, and where to a Stranger, 199. pl. 2. Termor deviſes after the Death of his Wife, 199. pl. 3, 4. Where Deviſe to one after the Death of another, or from a future Time, it ſhall deſcend to the Heir in the mean Time, 199. pl. 5. Termor deviſes to his Wife for Life, and after her Death to his two Sons, if they have no Sons, and if they have, to their Sons, 200. pl. 4. Deviſe of Lands to his Wife which were ſettled on her, and they were not ſettled on her, 200. pl. 7. Deviſe of the Profits of his Land to his Siſter for Life, to be paid by his Executor, 200. pl. 8. Diverſity where one deviſes Whiteacre to one in Tail, *Item* Blackacre, and where it is *Item*, I deviſe to her Blackacre, 200. pl. 1. 201. pl. 2, 8. Upon Conſtruction of various Words in Wills, 201. pl. 3, 4, 5. Whatſoever I have not diſpoſed of, carries Fee, 201. pl. 7. Deviſe to *A.* the Son of *B.* and his Heirs, if he lives to twenty-one; and if he dies before, to the next Son of *B.* and he dies, the next Son ſhall have but for Life, 201. pl. 8.

For Life or Fee, 202. pl. 1. Grant for uncertain Time, Freehold, 202. pl. 2, 3, *&c.* To one and his Heirs till Money levied, *&c.* Fee, 202. pl. 6.

For Life where no Eſtate limited, 202. O. Otherwiſe in Caſe of King, 202. pl. 1. 203. pl. 2, 3, *&c.* For Life of Grantee, 202. pl. 2. But if King grants Deanery or Biſhoprick generally, it is a Fee, for he could limit no other Eſtate, 202. pl. 3, 5. If Rent granted without limiting any Time, or Covenant to pay 20*l.* yearly it ſhall be for Life, 203. pl. 6, 7. Where Grant of ſame Rent ſhall be intended *talem*, 203. pl. 8. Diverſity where Leaſe, and where Deviſe to Executors for Payment of Debts, 203. pl. 6.

For whoſe Life intended; Diverſity where Tenant in Fee, or Tenant in Tail or for Life leaſe, without ſaying for whoſe Life, 204. pl. 1, 2, *&c.*

Eſtate expreſs not altered by Implication, as where Deviſe to one and the Heirs Male of his Body, and if he dies without Heirs of his Body, Remainder, *&c.* 236. pl. 1. So where an expreſs Eſtate in Fee or Tail given, it ſhall not by any Words of Implication be taken to be only for Life, 237. pl. 2, 3. Deviſe to *A.* for fifty Years, if he lives ſo long, and after the Term to the Heirs of the Body of *A.* and for Want of ſuch Iſſue, to, *&c.* no Tail in *A.* 237. pl. 4. Diverſity where Deviſe to *A.* and if he dies without Iſſue, to *B.* and where to *A.* for Life, and if he dies without Iſſue, to *B.* 237. pl. 5.

Croſs Remainders by Implication, 237. pl. 1. Diverſity where Gift to Two only, and where to Three or more, 238. pl. 2. Diverſity where in Conveyance and where in Will, 238 pl. 2. Marg.

Tenant after Poſſibility, *&c.* where Gift in Tail by King, 238. pl. 1. Otherwiſe if by him given to a Man with his Kinſwoman in Frankmarriage; but otherwiſe in Caſe of common Perſon, 238. pl. 2. Not ſo, tho' each 100 Years old, 238. pl. 3. Muſt be *ex proviſione legis*, not *hominis*, 238. pl. 5. Not where Marriage diſſolved by Divorce, 239. pl. 6. Of a Remainder, 239. pl. 7. Where Iſſue barred by Husband's Fine, and yet Wife continued Tenant in Tail, not after

Poſſibility, 239. pl. 8. Privileges of ſuch Eſtate as to be diſpuniſhable of Waſte, not compellable to attorn, &c. 239. pl. 1, 2, &c. Qualities not agreeable with an Eſtate-tail, as Feoffment Forfeiture, drowned by Fee or Tail coming to him, &c. 240. pl. 9, 10, &c. Grantee of Tenant after Poſſibility hath not Privileges, 240. pl. 3.

Tenant by Curteſy of what Things not of Uſe, Reverſion or Remainder on Eſtate for Life, but if Rent reſerved of the Rent, 240. pl. 1. Not of Seigniories, Rents, &c. if Freehold ſuſpended during Coverture; otherwiſe if for Years only, 240. pl. 2, 3, &c. Of Caſtle of Defence for the Publick, tho' Woman not endowed thereof, 240. pl. 5. Of Common *ſans number*, 240. pl. 6. Of *Caput Baroniæ*, 241. pl. 7. Not of Copyhold without Cuſtom, 241. pl. 8. Of Tail ſpent, 241. pl. 1. Of Rent remaining, tho' not if determined, 241. pl. 2, 3. Not where Wife found Ideot, 241. pl. 5. Husband of King's Nief married by Licence, 241. pl. 4. Huſband of Wife Intruder on King, 241. pl. 6. Not where Gift to Wife and another Woman, and the Heirs of their Bodies, 241. pl. 7. Not where Remainder veſted in another on Death of Wife, 241. pl. 8. Not of Seiſin in Law, as where Husband dies before Entry, 242. pl. 1. Otherwiſe of Advowſon, Rent, &c. 242. pl. 2. Tho' Iſſue dead, 242. pl. 2. Not if Child ripped out of her Body, 242. pl. 3. If Iſſue born alive, tho' never cried, 242. pl. 4. By Cuſtom of Gavelkind without Iſſue, 242. pl. 5. Initiate after Iſſue, tho' not conſummate till Wife's Death, 243. pl. 1. Therefore after Iſſue ſhall do or receive Homage, 243. pl. 2. His Feoffment after Iſſue no Forfeiture, 243. Tho' Wife attainted of Felony after Iſſue; otherwiſe if before, 243. pl. 4. He ſhall have the Purchaſe of his Wife's Villein, 243. pl. 5.

Eſtoppel.

By Record, and no Averment againſt it, 252. pl. 1. Muſt be certain to every Intent and preciſe Affirmation, 252. pl. 1. Marg. By Deed enrolled, to ſay it was not his Deed, or not acknowledged, 252. pl. 2. By Deed inrolled, to ſay it was by Dureſs, 252. pl. 3. By bringing Dower eſtopped to claim Jointure, 252, pl. 4, 5. If Outlawry reverſed by Name of Eſq; he ſhall not after ſay, he was a Knight, 252. pl. 6. What ſtands with Record pleaded, 253. pl. 1. So that nothing paſſed by Feoffment inrolled, 253. pl. 2, 3, 4, &c. Not by Submiſſion to Fine, becauſe Entry is *Quod non vult contendere Domino Rege*, 253. pl. 7. No Eſtoppel where Truth appears by ſame Record, 253. pl. 10, 11. By Fine levied by Stranger in my Name; otherwiſe if by one of ſame Name, 254. pl. 2. So if in a *Præcipe* againſt *A. B.* comes in the Name of *A.* and acknowledges the Action, 254. pl. 3. So if one comes in as Vouchee, &c. 254. pl. 4. So in Caſe of Acknowledgment of Recognizance, Statute, &c. 254. pl. 5, 6. By Writ by another ſued out in my Name, 254. pl. 7.

By what Record, not where Court hath no Juriſdiction of Cauſe, &c. 255. pl. 1, 2, &c. Not by Purchaſe of a Licence to alien, for the Words are *Tenentur in Capite ut dicitur*, 255. pl. 5. By Acceptance of King's Patent for Lands, 255. pl. 6. By Pleading, 255. pl. 7, 8. By Confeſſion of Tenure in *ceſſavit*, &c. 255. pl. 9. After ſuppoſing Bond made in one County, he may bring another Action, and ſuppoſe it made in another, 256. pl. 10. Not by Suppoſal of Diſcent in former Writ, 256. pl. 11.

By not denying, 256. pl. 14, 15, &c. Diverſity as to ſuing general and ſpecial Livery, for laſt as to Tenure is but *ut dicitur*, 256. pl. 16, 17.

By giving Bail by wrong Name, 256. pl. 18.

Who eſtopped; not Feme Covert by Pleading, 257. pl. 1, 2. 264. pl. 13. May be by Fine, not Deed, 257. pl. 3, 6. Heir in Fee eſtopped by Recovery, tho' no Tenant to *Præcipe*, 257. pl. 4. Otherwiſe of Iſſue in Tail, 257. pl. 5. Feme Covert by Recovery, tho' not examined, 257. pl. 6.

By Confeſſion, Verdict, &c. Not as to Matter not contrary thereto, 258. pl. 1, 2, &c. Otherwiſe where con-

contrary to former Plea, 258. pl. 4, 5, &c. Where by Suppoſal or Admiſſion in former Action, or not, 258. pl. 8, 9, 10, &c. By Acknowment or Admiſſion in a former Action, 259. pl. 13, 14, &c. Not by Matter not material to the Iſſue, 259. pl. 1, 2.

After Nonſuit, Plaintiff cannot ſay contrary to what admitted; as if Deed pleaded, and Plaintiff ſays it was made by Dureſs, and is after Nonſuit in a new Action, he cannot ſay he was an Infant when made, for before the Deed was admitted good in every Point but for the Dureſs, 260. pl. 1. As to Variance of Place and Time alledged in former Action, 260. pl. 7, 8, &c. Not by Suppoſal in a Writ, 261. pl. 11, 12, &c. Where Tenant not by Admittance in former Action, 261. pl. 17. Diverſity where Suppoſal in Counts and where in Bar or other Pleadings, 261. pl. 18.

After Diſcontinuance may alledge Payment in another Place, 261. pl. 1.

Where by Verdict between Strangers, 262. pl. 1, 2. And as to Strangers, 263. pl. 5, 6, &c.

By Judgment againſt one by a wrong Name, 264. pl. 12, 13. Where Strangers, and who may take Advantage of an Eſtoppel, 264. pl. 14, 15, &c.

Not by Recital, becauſe no direct Affirmation, 265. pl. 1. By Recital of Leaſe in Releaſe, 265. pl. 2, 8. But a Releaſe by *A.* to *B.* in his full Seiſin, ſhall not eſtop *A.* to ſay *B.* had nothing in the Land, 265. pl 7. and *vide* pl. 3, 4, &c. But is where recital material, 265. pl. 9. Where one by Indenture reciting ſhe was ſeiſed in Fee, covenanted to grant a Rent-charge, 265. pl. 10. Where an Under-leſſee by Indenture covenants to perform all the Covenants in the original Leaſe, he is eſtopped to ſay there are no Covenants therein, 266. pl. 11.

Not by Surplus, 266. pl. 9, 10. Not by Thing not material, 266. pl. 12, 13. Not by not denying a Thing not traverſable, 266. pl. 15.

By what Act or Acceptance, 267. By Acceptance of Leaſe of his own Land, by Indenture, 267. pl. 1, 2. Not by King's Patent for Years, 267. pl. 3. Not Leaſe of Herbage by Indenture, 267. pl. 4. Diverſity where Leaſe by Indenture, and where by Deed Poll, 267. pl. 5, 6. Not by Copyholder accepting Copy for Life from Lord, 267. pl. 7. If Diſſeiſor by Indenture enfeoffs Diſſeiſee, 267. pl. 9.

Where eſtopped in Name, 268, 271. pl. 1, 2. Diverſity where in Surname and where in Chriſtian, 268. pl. 1, 2, 3. By entring into a Bond by a wrong Name, 268. pl. 4, 5.

Not by Generalty, otherwiſe by Particularty, 268, 269. pl. 7, 8, 9. Condition to perform all Agreements ſet down by *J. S.* Defendant may ſay there were no ſuch Agreements, 268. pl. 2. If to perform all Covenants in an Indenture, he cannot ſay there is no ſuch Indenture, but may, that there are no ſuch Covenants; but then the Bond will be taken to be ſingle, and on Demurrer Plaintiff ſhall have Judgment, 269. pl. 3. If Condition to ſuffer Obligee to carry away all Marle in ſuch a Cloſe that he hath right to, Obligor may ſay that he hath no Right to any, 269. pl. 4, 5. Condition that he and his Wife ſhall appear, he cannot ſay he had no Wife, 217. pl 13. Where Condition to pay all Legacies given by the Will of *J. S.* eſtopped to ſay *J. S.* made no Will, but may ſay he gave no Legacies, 270. pl. 14, 15. And ſeveral other like Caſes, 270. pl. 16, 17.

Not eſtopped to ſay what ſtands with the Deed, 271. Otherwiſe if not, 271. pl. 5. If Leſſee by Indenture b ings Covenant againſt his Leſſor, he cannot ſay, not in of his Demiſe, 271. pl. 7, 8. Both Leſſor and Leſſee eſtopped by Indenture, 272. pl. 9. Mortgagor that Leaſes by Indenture bound after he hath paid the Money, 272. pl. 10. But no Concluſion where Truth appears, 272. pl 3. Or where the Matter in Writing confeſſed and avoided, 272. pl. 12. Parties bound by material Words in an Indenture, not others, 272. pl. 13. May ſay Deed was delivered after the Date, 272. pl. 1. Not that Deed delivered at other Place than dated, 272. pl. 2. Where not eſtopped by Intendment, 273. pl. 4. Acquittance for Rent due at a Day, Eſtoppel to demand Rent

Rent due before; otherwiſe if not under Hand and Seal, 273. pl. 5. Not by Avowry for Rent due at a Day to avow for Rent due before, 273. pl. 6. But miſprinted after, being put for *before*.

Eſtoppel againſt Eſtoppel puts the Matter at large, 273. pl. 1, 2. 273. S. 1, 2, *&c.* Where each eſtopped by their Pleading, 274. pl. 4, 5. Where the Iſſue in Tail eſtopped by Fine, and Remainder-man by his Indenture, and ſo Matter ſet at large, 274.

What Perſons eſtopped, not Iſſue in Tail, 274. pl. 1, 2, *&c.* Not bound by Recovery when no Tenant to *Præcipe*, 275. pl. 7. Who eſtopped, he that comes under Eſtoppel, 275. As Alienee, 275. pl. 1, 2, 3, *&c.* Heir, but not if he claims by another Anceſtor, 276. pl. 1, 2, 3. Tho' forced to make his Title thro' him, 276. pl. 4. Succeſſor, 276.

By Verdict, not by Thing found not in Iſſue, 276. pl. 4. Or not directly put in Iſſue, 276. pl. 5.

By Specialty, not Stranger thereto, 277. Continuance thereof not after Leaſe ended, 277. pl. 1, 2. Heir eſtopped by ſuing general Livery; but if he dies, his Heir not, 278. pl. 3.

Where an Intereſt paſſes, 278. As if ſeveral Tenants of ſeveral Lands or Tenants in Common join in Leaſe, no Eſtoppel, 278. pl. 3, 4. Where Rent by Indenture reſerved to one Jointenant good by Eſtoppel, 278. pl. 6. Where the Iſſue in Tail levying a Fine in the Life of his Mother, bars the Intail, and paſſes his Remainder in Fee, 278. pl. 7. *A.* Tenant for Life of *B.* leaſes by Indenture for Years, and then purchaſes the Reverſion in Fee, and *B.* dies, *A.* may avoid this Leaſe, 279. pl. 8. One leaſes for forty Years, and an Year after by Indenture makes another Leaſe for forty Years, good by Eſtoppel for thirty-nine Years, and for the other Year by carrying an Intereſt, 279. pl. 9.

Eſtoppels, the ſeveral Sorts, 279.

How to be taken Advantage of, 279. Jury not eſtopped, but may find the Truth, 280. pl. 2. Tho' not contrary to what admitted by Parties, 280. pl. 3.

Eſtoppels ought to be mutual, 280. Therefore no Eſtoppel on Leaſe by Infant, *&c.* by Indenture, 280. pl. 1.

Eſtray.

Swans, 281. A. 1. Not of King's Goods, 281. pl. 1. Not of Stray by him ſeiſed, tho' he after ſtrays out of King's Manor, 281. pl. 2. Of Goods of Infant, Feme Covert, *&c.* 281. pl. 3. Proclamation thereof, where, and in what Manner, 281. C. May be taken by Owner without Proof, unleſs in the Caſe of King, 282. pl. 1, 2. Where before Year ended it ſtrays into another Manor, firſt Lord cannot enter and fetch it out, 282. pl. 3.

Lord cannot work a Horſe, tho' with Withy about his Neck, 282. pl. 1. May milk Cow or ſhear a Stray, 282. pl. 2. Fettering unruly Stray, 282. pl. 3. 283. pl. 4. Detainer till ſufficient Amends for Paſture, 283. pl. 5. Not to be delivered over to another to keep, 281. pl. 6. Ought to be kept in Manor on Lands in Poſſeſſion of Lord, 283. pl. 7.

Who ſhall have it; Tenants in Common of a Manor ſhall have it as ſuch, 283. pl. 1. Otherwiſe if by Preſcription they ought each to take in their Turns, 283. pl. 2. Stray in Wife's Manor ſeiſed by Husband, ſhall go to his Executors; otherwiſe if he died before Seiſure, 283. pl. 3. So if Tenant for Life ſeiſes, and dies before the Year and Day, his Executors ſhall have it, 283. pl. 4. Property relates to Time of Seiſure, 284. pl. 5.

Pleading in Relation thereto, Tender of Satisfaction, 284.

Eveſque or Biſhop.

Not before Conſecration, 285. pl. 1, 2. No Cathedral withour, 285. pl. Marg. Yet Biſhop elect may ſit in Parliament, 285. pl. 3. And before conſecrated certify Excommunication, *&c.* 285. pl. 4. Old Preferment not void till Conſecration, 285. pl. 5, 6.

In ancient Time given by King, tho' after he gave a *Conge* to Chapter to elect, 285. pl. 7, 8, *&c.* All hold

per Baroniam, 286. Biſhopricks in *Wales* founded by their Princes, and upon their Forfeiture for Treaſon came to the Crown, 286. pl. 12. 288. F. Formerly Tranſlations were by Poſtulation, not Election, 286. pl. 13.

By whom elected; by the Chapter with King's Licence, 286. Biſhopricks, *&c.* kept vacant for many Years, 287. pl. 8, 9. The Manner and Order of electing them by 25 *H.* 8. 287. pl. 10. Where Pope might, 286, 287.

Temporalties not in him before Reſtoration by King, 288. E. May be granted to him before Conſecration, 288. pl. 3. But not otherwiſe than in Fee, and will be ſo, tho' limited for Life or Years, 288. pl. 4.

Inveſtiture by King, tho' Pope ſometime uſurped it, 288. pl. 1, 2.

All Biſhops formerly made *per traditionem Baculi & annuli*, 289. pl. 3.

Excommunication.

By whom certified. By Ordinary only, 290. pl. 1. Not by Official or Commiſſary, 290. pl. 3, 4. But Biſhop may certify Excommunication by his Commiſſary or Official, becauſe done in his Right, 290. pl. 3. Marg. By Chancellor of *Oxford* and *Cambridge*, and where for temporal Matters, 290. pl. 5. and Marg. By Commiſſioners delegate, 291. pl. 6. By High Commiſſioners, 291. pl. 7.

Certificate, how made; the Principal Cauſe of Suit muſt appear therein, 291. pl. 1. Ought to be *Univerſis Eccleſiæ filiis*, or to Juſtices of the Court, 291. pl 2, 3. Muſt contain Day of Excommunication, 291. pl. 4. Not by one Biſhop that another hath certified him, 291. pl. 5. May be of what found in Regiſter, without poſitively ſaying he was excommunicated, 291. pl. 6.

Pleaded in Stay of an Action, not by Pope, 292. pl. 1, 2, 4. But by ſome Biſhop within the Realm to whom the Court may write, 292. pl 3. By Archdeacon that hath ordinary Juriſdiction, 292. pl. 5. By Vicar general where Biſhop beyond Sea, or *in remotis*, 292. pl 6. Marg. Certificate once received good, tho' Biſhop dies, 292. pl. 7. Upon ſuch Plea Writ abates, not but the Entry is *Quod loquela remaneat ſine die quouſq; &c.* 292. pl. 8.

Excommunicato capiendo; where by Archdeacon it ought to appear in the Writ, that the Matter was within his Juriſdiction, 293. pl. 1. In the *Significavit* it ought to be expreſſed, that the Party was commorant in Dioceſe where, 293. pl. 2. By Stat. of 5 *El.* returnable in *B. R.* and ſeveral Caſes thereon, 293. pl. 3. and Marg. pl. 4. and Marg. 294. pl. 5, 6. Addition therein, 294. pl. 7, 8.

Pleading thereof, 294, 295. Not in Bailiffs where brought by Corporation aggregate, 295. pl. 1. Otherwiſe where brought by Executors, and one of them is excommunicated, 295. pl. 2. Biſhop Defendant cannot plead Excommunication by himſelf or Commiſſary, 295. pl. 3. Tho' one ſtrikes in Church-yard, and 5 *Ed. 6.* ſays, he ſhall be *ipſo facto* excommunicated, yet it cannot be pleaded till a Sentence declaratory thereof, 295. pl. 4.

Where Cauſe thereof ought to appear in *Significavit*, 295. pl. 1. At Common Law the Writ was always *pro contumacia*, 295. pl. 2. But now Cauſe muſt be ſet forth in Writ, 296. pl. 3. And Writ may be quaſhed for Uncertainty in the Cauſe, for which, 296. pl. 4, 5.

Abſolution, 296. pl. 1, 2.

Cautione admittenda, 297.

Execution.

In what Court ſued; in *B. R.* where Record comes there by Error, not *Certiorari*, 298. pl. 1. So in *B.* if Record comes there upon falſe Judgment, 298. pl. 2. How executed when Judgment brought out of *Ireland* by Error, 298. pl. 3.

By Entry, 298. Upon the Heir of Tenant againſt whom Recovery in Real Action, 299. pl 3, 4. Tho' ſeveral Diſcents ſince Recovery, 299. pl. 3, 5, 6. After the Year upon him againſt whom Recovery was not upon a Stranger, 299. pl. 1, 2.

In Law without Action upon Fine *Sur Cognizance de droit come ceo*, 299. pl. 1.

By Conjunction of Eſtates, as if Fine levied to one, Remainder to his Heirs, 300. pl. 1, *&c.*
As to one ſerves for another; where once executed ſhall never be again, 301. pl. 1, 2, *&c.*
How made in Part in Name of Whole, 301. pl. 1. Otherwiſe if in Poſſeſſion of ſeveral Perſons, 301. pl. 2. If Leaſe ſold on *Fieri facias*, muſt not put out Tenant and put Vendee in Poſſeſſion, 301. pl. 1. Marg. Where Part of the Acres in the Ejectment recovered, 301. pl. 3. Sheriff muſt deliver ſo many Acres in Execution, according to Uſage of Country, not Statute, 302. pl. 4. Where Rent or Common is recovered, 302. pl. 5. Where Part recovered, and Plaintiff is to be put in Poſſeſſion by his own ſhewing, 302. pl. 6, 7. May break Houſe on *Habere facias ſeiſinam*, or *poſſeſſionem*, 302. pl. 8. Where Door broke upon Execution for King, 302. pl. 9. Not on *Capias*, *Fieri facias*, or other Proceſs at Suit of common Perſon, 302. pl. 10. But Privilege of Houſe extends only to Maſter and Family, 302. pl. 11. By Metes and Bounds, unleſs in Caſe of Jointenants or Tenants in Common, 303. pl. 12. If twenty Acres in one Town and twenty in another found on *Elegit*, Sheriff ought to deliver a Moiety of the twenty in each, 303. pl. 13.
Againſt whom; againſt Heir, 303. pl. 1. Againſt Iſſue in Tail, 303. pl. 2.
Upon Fines, 304. pl. 1, 2, *&c.*
By what Court awarded; *Levari*, not by Hundred Court or Court-Baron, but *Diſtringas*, 304. pl. 1. *Super tenorem recordi*, 304. pl. 2. Whether in *B. R.* upon a Judgment removed thither by *Certiorari*, 305. pl. 4. Awarded by *B. R.* the Party and Record of the Attainder being removed thither, 305. pl. 5. By *B. R.* on Conviction for Deer-ſtealing removed thither by *Certiorari*, 305. pl. 8.
Of what Things; of Lands before extended, 305. pl. 1. Of Strangers Cattle levant and couchant, by *Levari* on Outlawry, 305. pl. 1. Not of Copyhold, 305. pl. 2. Not of Leaſe for Years by Copyholder made with Lord's Licence, 306. pl. 3. Of Lands in ancient Demeſne, 306. pl. 4. Not of Lands of Diſſeiſor on Recovery of Debt againſt Diſſeiſee, 306. pl. 5. Of Lands in Truſt, 306. pl. 6. Of Reverſion on an Eſtate for Life, 306. pl. 7. Not of Goods poſſeſſed by Defendant's Villein, 306. pl. 8. Of Annuity granted by King for twenty-one Years, and payable by Receiver of Court of Wards, for this not like an Annuity which chargeth the Perſon only, 306. pl. 9. Where Defendant Partner with another on *Fieri facias* Sheriff muſt ſeiſe all, and ſell an undivided Moiety, 306. pl. 10.
How made joint and ſeveral, 307. Upon Judgment for Damages againſt Three, Execution muſt go againſt all, 307. pl. 1, 2. 325. pl. 5. Cannot be by *Elegit* againſt one and *Capias* againſt the other, 307. pl. 3. Againſt one of the Bail only, 307. pl. 4. Upon a joint Recognizance, Execution muſt be againſt all, 307. pl. 5. Otherwiſe if joint and ſeveral, tho' Judgment againſt all in a *Scire* thereon, 307. pl. 6. But if joint Judgment tho' on joint and ſeveral Bond, the Execution muſt be joint, 308. pl. 7. Where Judgment for the King to have two Parts, and the Informer one, there ſhall be but one Execution, 308. O. 1.
Who ſhall have it; Executor when he comes of Age ſhall have it upon a Judgment obtained by Adminiſtrator during his Minority, 308. pl. 1. By Executor made on Contingency, on Judgment obtained by one before it happened, 308. pl. 2. Not by Husband after Death of Wife, on Judgment by them recovered as Executrix; tho' otherwiſe if for her proper Debt, 308. pl. 3. 309. pl. 4. Not by Adminiſtrator of Executor, or of Adminiſtrator, 309. pl. 4, 5. By Adminiſtrator *de bonis non*, 309. pl. 5. Marg. By Adminiſtrator of Adminiſtrator who had recovered Damages in Treſpaſs upon his own Poſſeſſion, 309. pl. 6. By Husband after Judgment in *Scire facias*, that they ſhould have Execution, tho' Wife dead, 309. pl. 8. Executor and not Heir; and if Recovery in Real Action, Heir of the Land and Executor of the Damages, 310. pl. 1, 2.

1, 2. But if three Parceners in Mortdanceſtor recover Land and Damages, they depend on Freehold, and tho' Judgment joint ſhall be taken diſtributive; and if two die, no Survivorſhip, but the Third ſhall have Execution only for his Part, 310. pl. 2. The Wife, and not Executors of the Husband, 310. Where Recovery in her Right in *Quare impedit*, 310. pl. 2, 3. Where Land and Damages recovered, 311. pl. 4, 5.

Againſt whom, 311. Againſt one, if on *Scire facias* returned, that other was deceaſed, or had *nichil*, 311. pl. 1, 2. 312. pl. 7, 8. Not againſt Heir where Executor hath ſufficient, 311. pl. 4. Where one dies, againſt Survivor, 311. pl. 5.

Againſt Wife where Damages recovered againſt both, it may be againſt the Wife ſurviving, 312. pl. 1, 2. Againſt the Adminiſtrator of an Executor againſt whom Judgment obtained, 312. pl. 3. Where ſeveral of ſame Name, Execution muſt be againſt the right Man, 312. pl. 4, 5. Judgment againſt *B.* Knight and Baronet, and Writ of Execution ſo alſo, yet *B.* Knight only, againſt whom, *&c.* may be taken, 312. pl. 6, 7. Againſt the Husband ſurviving after Judgment in *Scire facias* againſt both, 312. pl. 10.

In what Place, 313. Into what County awarded, 313. pl. 1, 2. *Scire facias* on Recognizance, 313. pl. 3. 314. pl. 4. *Elegit* taken into as many Counties as Plaintiff pleaſes, but not into one with a *Teſtatum* that an *Elegit* had been into another, and *Nihil* returned, which is falſe, 314. pl. 5. Diverſity between Recognizance taken by Judge *de B. R.* and *B.* as to bringing *Scire facias*, 314. pl. 6.

Of what Things, 315. Not of Things fixed, unleſs fixed for Conveniency of Trade, 315. pl. 1, 2, 3. Of ſtanding Corn, but not of ſtanding Wood, tho' Defendant Tenant for Years without Impeachment of Waſte, 315. pl. 4.

To what Time it relates for Land, 315. To Day of *Niſi prius*, 315. pl. 1. 316. pl. 4, 5, *&c.* To Day of Inqueſt taken, 315. pl. 2. Not ſo where an Aſſiſe is adjourned for Difficulty, 315. pl. 3. Not of Land aliened after Inqueſt taken, 316. pl. 8. Upon Recognizance to Time of Acknowledgment, 316. pl. 9, 10, 11. To the Time of the Judgment, *viz.* one Day of Term in which, 316. pl. 12, 13, 14. 317. pl. 18. Judgment againſt an Heir to the Time of the Original, 317. pl. 18. Amercement upon Nonſuit to the Time of the Aſſeſſment, not of the giving Pledges, 317. pl. 19. As to Iſſues of Jurors, 317. pl. 20. If *Elegit* upon a *Devaſtavit* returned to the Time of the firſt Judgment, 317. pl. 21. Diverſity as to Recognizance where Bail in *B. R.* and where in *B.* 317. pl. 22, 23. By Statute 29 *Car.* 2, as to Creditors to ſigning Judgment only, 317. pl. 24.

To what Time it ſhall relate as to Chattels, 318. Goods ſold before Judgment not liable to Execution, 318. pl. 1. So Goods ſold before Execution taken out, 318. pl. 2. But ſuch as he had, at the Time Execution awarded, liable, 318. pl. 3. Tho' Defendant dies after, 318. pl. 4. Tho' Judgment againſt Executor, 318. pl. 5. Tho' firſt *Elegit* erroneous and ſecond awarded, thoſe Goods he had at the Time of the firſt liable, 319. pl. 6. Goods liable from the Teſte, tho' before Writ was actually taken out, 319. pl. 7. By 29 *Car.* 2. from Delivery of Writ to Sheriff as to Strangers, 319. pl. 8. Sheriff muſt execute firſt Writ delivered to him, 319. pl. 9, 10. Where Two delivered ſame Day, and laſt firſt executed, good, and Party hath only Action againſt Sheriff, 319. pl. 11. And not ſo, if Plaintiff in firſt ordered Sheriff to ſtay Execution till next Day, 319. pl. 12.

At what Time Goods put in Execution, 320. After attached, 320. pl. 1. Having ſeiſed, Sheriff may ſell after diſcharged of his Office, 320. pl. 2. But not after Return *Non invenit emptores*, tho' *Diſtringas* to new Sheriff to make old ſell, 320. pl. 3. Sheriff cannot ſell after *Superſedeas* unleſs on *Venditioni exponas*, 320. pl. 4. Reverſion on Leaſe for Years may be extended, but not Rent without Reverſion, 321. pl. 5. Sale by Sheriff good after Writ of Diſcharge, of which he had no Notice, 321. pl. 6. By

8 *Ann.* Goods not to be taken in Execution unleſs Rent to Landlord paid, not exceeding one Year, 321. pl. 7.

In what Place, 321. One walking in *Weſtminſter-Hall* taken in Execution by Tipſtaff, 321. pl. 1. Marg. Damages recovered in Ancient Demeſne, not levied of Lands in Manor which are Frank Fee, 321. pl. 1. One taken on *Capias ad Satisfaciendum* directed to the Sheriff of *Middleſex*, cannot upon another *Capias ad Satisfaciendum* on other Judgment, directed to the Sheriff of *London*, be charged, tho' the ſame Perſons, and one Gaol, 321. pl. 2. Where Recovery in *B. R.* againſt one in *Fleet*, he cannot be therewith charged, without bringing up by *Habeas Corpus*, 321. pl. 3. So tho' *Languidus in Priſona* on the *Habeas Corpus* returned, 322. pl. 2.

In Execution before Prayer, 322. Not where Recovery againſt one in Priſon, 322. pl 1. Or where one ſurrenders himſelf in Diſcharge of his Bail, 322. pl. 1. Marg. Where a *Committitur* muſt be entered, 322. pl. 2. Not by Order of Court, unleſs on Plaintiff's Prayer, 322. pl. 3. If taken upon a *Capias Utlegat.* within the Year, 322. pl. 4. Otherwiſe if taken after the Year, 323. pl. 5. But if taken within the Year, yet Plaintiff may chuſe whether he ſhall be in Execution for him, 323. pl. 3.

Upon Prayer, 323. How where Judgment in *B.* againſt one in *Fleet*, 323. pl. 1, 2. Where taken for King's Fine in Treſpaſs, 323. pl. 3. Not where Recovery againſt Three, and one only taken for Fine, 323. pl. 5. Where one had been four Years in Priſon, 323. pl. 6. After a Writ of Error brought, if no Bail given, 324. pl. 7.

Execution with Satisfaction againſt one ſerves for the other, 324. And tho' Judgment joint, and Entry *Quod unica fiat executio*, it muſt be intended with Satisfaction, 324. pl. 1. So if ſeveral Judgments on joint and ſeveral Bonds, 324. pl. 2, 3. So where ſeveral Judgments for ſame Treſpaſs, 324. pl. 4, 5. But if after ſued, Defendant put to his *Audita Querela*, tho' both Judgments in ſame Court, 324. pl. 6, 7. So if one in Execution, and after the Goods and Moiety of his Lands taken upon *Elegit* againſt the other, the laſt is a Satisfaction, 324. pl. 8. Not ſo where one eſcaped with Conſent of Gaoler, 325. pl. 9.

Without Satisfaction, 325. If againſt Bail, not againſt Principal after, 325. pl. 1. If againſt Principal, not after againſt Bail, 325. pl. 2. Againſt one Bail, and after againſt the other, 325. pl. 3. If againſt Bail without Satisfaction, may after be againſt Principal, 325. pl. 4. But miſprinted, and the Word *Bail* put inſtead of *Principal*, and *Cro. Jac.* 545. inſtead of 549. Execution againſt Bail after one of the Principals taken, 325. pl 5. But miſprinted, *other Principals* being put inſtead of *Bail.*

What Thing put in Execution; the Body, 326. At Suit of King, 326. At Suit of common Perſon, 326. On Recognizance in Chancery by Courſe of Court, 326. pl. 2. So on Bails, Recognizance in *B. R.* 326. pl. 3. But not on Recognizance in *Banco*, 326. pl. 4. Or Bail in inferior Court, 326. pl. 5. 327. pl. 7. Not on Recovery of Damages in Dower, 327. pl. 8. Not on Recognizance by Bail on Writ of Error, 327. pl. 9. *Capias ad Satisfaciendum* lies for Coſts on a Nonſuit, 327. pl. 10.

Againſt what Perſon Execution by *Capias*, 327. Not againſt a Prior, Abbot or Biſhop, 327. pl. 1. Upon Statute Staple, *&c.* Peer taken 327. pl. 2. Not againſt Peereſs on Judgment in Debt, 328. pl. 3. Where againſt Peer, 328. pl. 4.

Of Land, when to be ſued, 328. Not on Recovery of Damages in Waſte, till Sheriff returns he hath nothing, 328. pl. 1. Upon Recognizance to pay Money at ſeveral Days after firſt Day paſt, 328. pl. 2. Not againſt an Heir during his Minority, 328. pl. 3. Not in Debt, if Part acknowledged and Iſſue for the Reſt till tried, unleſs Plaintiff releaſes Damages, 328. pl. 1, 2. Or Plaintiff be Nonſuit on the Iſſue, 328. pl. 3. Tho' upon Surrender by Bail, Plaintiff refuſes to take him in Execution, yet he may take him by *Capias ad Satisfaciendum*, 329. pl. 4. After Judgment ſigned before entered, 329. M. 1.

Of the Goods of whom, 334. Not of Goods of Members, on Judgment againſt Corporation, 334. pl. 1. Nor where Fine on Corporation, 334. pl. 2.

One Execution after another, 335. Where taken for King's Fine and ſuffered to eſcape, Plaintiff may have *Fieri facias* or *Elegit*, 335. pl. 1. Not after Defendant hath allowed Sheriff the Money on Account, 335. pl. 2. If taken on *Capias ad Satisfaciendum*, he is in Execution before the Return of the Writ, 335. pl. 3. After an Eſcape, 335. pl. 4. In Execution again after Eſcape, if retaken on freſh Purſuit, 336. pl. 5. After Reſcue of himſelf, 336. pl. 6, 7. After voluntarily ſuffered by Sheriff to eſcape, 336. pl. 8. When after Eſcape retaken in another County, 336. pl. 9. After charged with Fine ſuffered to go at large by Agreement with Plaintiff, 336. pl. 10. After taken on a *Capias Utlegat.* and eſcaping, 337. pl. 11. Where Error brought by one in Execution, and Judgment affirmed, Suit muſt be on Recognizance given, 337. pl. 12. Where one in Execution let out upon Recognizance, Suit muſt be thereon, 337. pl. 13, 15, 19. No ſecond Execution without Return of firſt, 337. pl. 14. After *Audita Querela* on Stat. 11 *H.* 7. 337. pl. 16. Where one in Execution bailed, he may be after taken, 337. pl. 17, Not after Money levied on firſt *Fieri facias*, 337. pl. 18. After Delivery by Privilege of Parliament, 338. pl. 20. After Death of one in Execution, 338. pl. 21. Not after Death of ſole Defendant in Execution, 338. pl 22. Otherwiſe by Statute 21 *Jac.* 339. pl. 25, 26. And before where only taken upon *Capias Utlegatum*, and not prayed in Execution, 338. pl. 23.

What Execution after another, 339. *Elegit* after *Fieri facias*, 339. pl. 1, 2, 3. So *Capias*, 339. pl. 4 Tho' Part levied on *Fieri facias*, *Capias* after, 339. pl. 5. Upon Judgment againſt Two, not *Fieri facias* againſt one, and *Capias* againſt the other, 339. pl. 6. No other after one *Capias ad Satisfaciendum* returned *Non eſt inventus*, 339. pl. 7. 340. pl. 8, 9. Otherwiſe if taken and eſcapes, if *Capias* not returned or filed, 340. pl. 10, 11, 12.

After *Elegit*, not if filed, 340. pl. 1. Otherwiſe if Error brought and Judgment affirmed in another Court, 340. pl. 2. 341. If *Elegit* returned *nihil*, 341. pl. 3. After Goods only taken on *Elegit*, 341. pl. 5. Where Return amounts to no more than a *Nihil*, 341. pl. 6. After a void *Elegit* filed, 341. pl. 7. After a Moiety delivered, not on Suggeſtion that he had other Lands, 342. pl. 8. Otherwiſe if he comes before Return of firſt filed, 342. pl. 9.

Execution, in what Caſes, by Entry, 342. In all Caſes where Writ demands Land or other Thing certain, 342. pl. 1. Not in Dower, 342. pl. 2, 3. In Aſſiſe of Mort-danceſtor, 342. pl. 4.

Who charged therewith, Criminal or Perſon attainted, 342.

By Common Law, 343. Body or Land not liable, 343. pl. 1. But Goods only and Grain, *&c.* growing on Land, 343. pl. 2. By *Levari facias* or *Fieri facias*, 343. pl. 3. But in Treſpaſs *Vi & Armis*, *Capias* lay and after Judgment, *Capias ad Satisfaciendum*, 343. pl. 4.

By *Levari* or *Fieri facias*, 343. How executed, 343. Term ſold by Sheriff without reciting Certainty of Commencement or End, 343. pl. 2. But if miſrecited Sale void, 343. pl. 3. But Term not to be extended without ſhewing the Certainty thereof, 343. pl. 4. Misbehaviour in Sheriff to perſwade Jury to price at Under-value, 344. pl. 5.

How by ſeveral Statutes, 344. pl. 1, 2. *&c.* by *Elegit*, and how to be executed, 344. pl. 1. Where Money on Recognizance to be paid at ſeveral Days, a Moiety extended after every Day, 345. pl. 2. Where upon two Judgments the whole may be extended, or not, 345. pl. 3. By *Capias ad Satisfaciendum*, 345. pl. 1, 2. Where *Capias* in Proceſs *Capias ad Satisfaciendum* after, 345. pl. 3. For Coſts on a Nonſuit, 345. pl 4.

Execution good without Return, 345. Where on *Fieri facias* Money is levied and delivered to Party, 345. pl. 1. So where taken on *Capias ad Satisfaciendum*, 345. pl. 2. Diverſity where Execution by Sheriff a-

lone, and where an Inquiſition taken, 345, 346.
Re-extent, 346. Not after Extent returned and filed, unleſs meerly void, as where the Lands of a Stranger are delivered, 346. pl. 1. But before filed Court may examine, and if Fraud, Deceit, *&c.* ſtop the Filing, 346. pl. 2. If Extent avoided by one, made on more ancient Statute, when ſatisfied, the firſt ſhall hold without Re-extent, 346. pl. 3. Upon Eviction by 32 *H.* 8. *cap.* 5. with Notes upon it, 346.

Executor.

Ordinary, his Power in Adminiſtrations, 347. Cannot ſue for Debts of Teſtator, 347. pl. 1, 5. But may or might for Goods taken out of his Poſſeſſion, 347. pl. 2. Where Action lay or lies againſt him, 347. pl. 3, 4. Cannot releaſe Debt before Adminiſtration granted, *a fortiori* after, 347. pl. 6, 7. May releaſe Treſpaſs upon Goods in his Poſſeſſion, 347. pl. 8. By what Law, and how Probate of Wills belongs to Ordinary, 348. pl. 10. Marg. Out of his Dioceſe commit Adminiſtration, 348. pl. 11, 12.
His Power touching Wills and Probate thereof, 348. King Executor may appoint others to take Execution upon them, *&c.* 348. B. 2.
Adminiſtration, in what Caſes granted, 349. If all Executors refuſe, 349. pl. 2, 6. Where Executor refuſes before or after Adminiſtration, 349. pl. 2. Where Will concealed, and good till proved, 349. pl. 3. Not before Refuſal of Executor, 349. pl. 4. Adminiſtration *de bonis non* after Death of Adminiſtrator or Executor dying Inteſtate, 349. pl. 5, 7, 8. Adminiſtration not to be granted to Executor of Adminiſtrator, 349. pl. 8. 350. pl. 9. Where Executor dies before Probate, tho' he leaves Executor, 350. pl. 10. Adminiſtration granted when there was a Will (tho' not known) void, tho' Executor after renounced, 350. pl. 11.
Adminiſtration upon 31 *E.* 3. how granted, 350. Upon Condition, 350. pl. 2. Comment upon the Statute, 350. pl. 3. May be limited as *durante minoritate*, *abſentia*, *pendente lite*, 351. pl. 4. Of Goods of Feme Covert, 351. E. Upon Statute 21 *H.* 8. with many Notes thereon, 407.
By whom granted; Metropolitan, 351. Where 100 *l.* Value in ſeveral Dioceſes, 352. When one dies beyond Sea Inteſtate, 352. pl. 3. If Biſhop dies Inteſtate, tho' nothing but in his own Dioceſe, 352. pl. 4. Where Goods in one Dioceſe in one Province, and in another Dioceſe in another Province, each grants, 352. pl. 5. *Bona notabilia* in ſeveral Dioceſes in ſame Province, 352. pl. 6. But if in two Dioceſes in ſeveral Provinces by each Archbiſhop, 352. pl. 7. Where *Bona notabilia* in *Ireland* and *England*, 352. pl. 1. By Dean and Chapter in Time of Vacation of Archbiſhop, *&c.* 352. pl. 2. Not where dead *in Itinere*, by Reaſon of Goods then about him, 352. pl. 3. Not by Biſhop where Obligation made but where at Death of Obligee, 352. pl. 4
Bona notabilia, what, 353. Goods of the Value of 5 *l.* in each Dioceſe, 352. pl. 3. 353. pl. 1. Debts by Bond or Note, 353. pl. 3, 4. Bond ſo where they are, 353. pl. 6. Judgments in Courts at *Weſtminſter*, 353. pl. 8.
Bona notabilia, the Value, 353. Anciently, tho' of the ſmalleſt Value, 353. pl. 1. 354. pl. 2. But by the Canon 1 *Jac.* 5 *l.* unleſs where by Cuſtom rated at a greater Sum, 354. pl. 6.
Adminiſtration, to whom to be granted, 354. To Feme Covert, 354. pl. 1, 2. Adminiſtration *durante minore ætate*, not within the Statute of Neceſſity to be granted to the Widow or next of Kin, 354. pl. 3. Perhaps otherwiſe where Executor made from a Day to come, 354. Where Right of Adminiſtration in Wife, it ought to be granted to her only, 354. pl. 5. But may be to Husband and Wife during Coverture, 354. pl. 6. Where ſhe hath a Right as Reſiduary Legatee, and refuſes, but prays it may be granted to another, yet may to the Husband, 355. pl. 7.
Adminiſtration *durante minoritate*, 355. Judgment againſt ſuch Adminiſtrator not void, tho' it appeared the Infant was above eighteen,

355. pl. 1. The Court will take Notice of the Eccleſiaſtical Law as to Time of its determining, 355. pl. 2. Infant comes of Age pending Action againſt ſuch Adminiſtrator, 355. pl. 3. Not ſufficient for him to aver Infant under twenty-one, 355. pl. 4. Diverſity where Action by, and where againſt ſuch Adminiſtrator as to Averment, 356. pl. 6, 7. Want of ſuch Averment help'd by Defendant's Pleading to iſſue, 355. pl. 4. 356. pl. 5. During Minority of ſeveral, and one comes of Age, 356. pl. 8. Diverſity as to Adminiſtration *durante minoritate* of an Executor, and of an Adminiſtrator as to Time of Determining, 356. pl. 9, 10. Adminiſtration *durante*, *&c.* of one Executor, granted to the other, 356. pl. 1. Of a Woman determines by her taking Husband, 356. pl. 12.

Adminiſtrator *durante*, *&c.* his Power, 357. May ſell Goods and do all an Executor may, 357. pl. 1. If Adminiſtration Special *ad commodum &c. non aliter*, cannot ſell unleſs *Bona peritura*, or to pay Debts, 357. pl. 4. Diverſity where ſuch Adminiſtration is general, and where reſtrained, 357. pl. 5, 6. After firſt repealed, and new Adminiſtration *durante* granted, he cannot ſo releaſe the firſt, but Infant may after call firſt to account, 357. pl. 3.

Paraphernalia, 357. Neceſſary and convenient Apparel, but not exceſceſſive, 358. pl. 4, 5, 6. A Piece of Cloth by Husband to Wife delivered to make her a Gown, tho' not made, ſhe ſhall have againſt Executor, not Dettee of Husband, 358. pl. 8. If againſt Husband's Deviſe, 358. pl. 9. What Jewels, *&c.* ſo, 358. pl. 9. 359. pl. 10.

Executors, by whom made, 359. By Queen, King's Wife, 359. pl. 2. By Executrix of Things ſhe hath as ſuch without Conſent of her Huſband, 359. pl. 3, 5. But not of Things ſhe hath in her own Right, without Aſſent of Husband, 359. pl. 4, 5. 364. pl. 2. By King, 359. pl. 6. Will by Feme Covert of Huſband's Goods by his Conſent, 358. pl. 7, 8.

By whom for collateral Reſpect, 360 Not by one attainted of Felony, 360. pl. 1. Or againſt whom an Exigent for Felony awarded, 360. pl. 2. By one outlawed in Perſonal Actions, 360. pl. 4. And to ſuch Man Adminiſtration may be granted, 360. pl. 3, 5.

Actions by them for what done in Life of Teſtator, 360. Raviſhment of Ward, 360. pl. 1. For an Eſcape upon mean Proceſs in Debt, 360. pl. 2. For not returning Writ or paying Money levied on *Fieri facias*, 361. pl. 3. *Quare Impedit*, 361. pl. 4. For cutting and carrying away Graſs, but not for Breaking his Cloſe, 361. pl. 6. By Stat. of 4 *Edw.* 3. 361. pl. 7.

What Actions Executors or Adminiſtrators may have, 362. Covenant for Money to them payable by Reaſon of Articles made between Defendant and Teſtator, 362. pl. 1. When Covenant to deliver Thing to Teſtator on Requeſt, and he dies before Requeſt; yet if not delivered on Requeſt by Executor, Covenant lies, 362. pl. 2. Villein againſt his Lord, 363. pl. 3. Where Jointenants covenant with each other and his Heirs, that the Survivor ſhall convey the Moiety to the Heirs of the other, the Heir may have an Action, 363. pl. 4. Upon Covenant with Teſtator, his Heirs and Aſſigns, 363. pl. 5. Upon Covenant with Biſhop and his Succeſſors, his Executors may have it for Want of Repairs in his Time, 363. pl. 6.

How made, 363. By Nuncupative Will, 363. pl. 1. Infant made Executor, and that *A.* ſhall have the Diſpoſition of, *&c.* till, *&c.* makes *A.* Executor till, *&c.* 363. pl. 2.

In what Manner, 364. Upon a Contingency, 364. pl. 1, 2. Cannot make three Executors, and that one ſhall have the Adminiſtration, 364. pl. 4. One for Part, and another for the Reſt, 364. pl. 4. *A.* and *B.* made, but that *A.* ſhall not meddle till he hath paid *B.* all Money due to Teſtator, 364. pl. 5. Executor of all his Corn and moveable Goods, is of every Thing, if no other appointed, 364. pl. 6.

Who may be Executors, 365. Mayor and Commonalty, 365. pl. 7. A Monk, *&c.* 365. pl. 8, 9. A Villein, 365. pl. 11. Wife may make Husband, of Goods ſhe hath as Executrix,

Executrix, 365. pl. 12. Perſons attainted, convicted, outlawed, 365. pl. 13. Excommunicated, 365. pl. 14. King, 365. pl. 15. Not Popiſh Recuſant, 365. pl. 16, 17.

What Things Executors ſhall have, what Heir, 366, 368. Executors ſhall have Term deviſed to Teſtator, and the Heirs of his Body, 366. pl. 1. Heir ſhall have Deeds concerning the Inheritance, 366. pl. 3. But if in Cheſt, Executors ſhall have Cheſt, 366. pl. 4. But if locked, Heir ſhall have Cheſt alſo, 366. pl. 7. Where if Teſtator recovered in Detinue for Deeds in a Box, the Executors ſhall have Execution for thoſe Damages and Coſts, 366. pl. 5. But if Special Deed recovered, Heirs ſhall have Execution of this and Damages, if the Deed cannot be had, 366. pl. 6. One delivers a Deed to be redelivered to his Heir, his Executor ſhall have it if it concerns not Heir's Land, 366. pl. 8. Bond to ſole Corporation and Succeſſor goes to Executors, 366. pl. 9. Executors ſhall have Ward, 366. pl. 10, 12. Relief, 366. pl. 11. Executors of Biſhop ſhould have had Ward he had in Right of Biſhoprick, 366. pl. 13. But not preſent to Church void in his Life, but King, 366. pl. 14.

Executors; what Things they ſhall have as Aſſignees, 367. Not Money to be paid to ſuch Perſon as Obligee by his Will ſhould appoint, and he appoints no Perſon, but makes Executors, 367. pl. 2. But Money awarded to be paid to one or his Aſſigns ſhall be paid to his Executors, 367. pl. 2. Margine

What Thing ſhall go to Executors or Adminiſtrators, 367. Poſſibility fixed in Teſtator, 367. pl. 1, 2. Leaſe for eighty Years if Leſſee lives ſo long, and if he dies, to his Executors, and he dies Inteſtate, his Adminiſtrator ſhall have it, 367. pl. 3. Covenant not to ſell Wheels to Prejudice of *A.* or his Aſſigns, extends to Adminiſtrator of *A.* 368. pl. 4.

What Heirs, and what Executors ſhall have, 366, 368. Fiſh in Pond or Deer in Park, Heir not Executors, 368. pl. 1. Eſtate *pur auter vie*, 368. pl. 3. King grants Chattel to one and his Heirs, it ſhall go to his Executors, 368. pl. 4. Termor grants a Rent to one and his Heirs, it ſhall go to his Executors, 368. pl. 5.

Executors; their Power before Probate, 369. Releaſe made to Executor before, good, 369. pl. 1. May bring Actions, but not declare before, 369. pl. 2. May releaſe before, 369. pl. 3. May do any Thing before except bringing and proſecuting Suits, 369. pl. 4.

What Acts Adminiſtration to make an Aſſent to Executorſhip, 369. Uſing Action, 369. pl. 1. Taking Goods of Teſtator and converting them, 369. pl. 2, 3. 370. pl. 4, 11. Claiming the Goods of the Inteſtate to his own Uſe, not ſo, 370. pl. 5. But granting Goods of the Teſtator is ſo, 370. pl. 6. Or releaſing or giving Acquittance for his Debt, 370. pl. 7, 8, 15. By one's taking Goods bequeathed without Aſſent of his Co-executors, 370. pl. 9, 10. Seiſing Goods of Teſtator, 370. pl. 12, 13. Not by Commiſſary Executor ſequeſtring Goods, 370. pl. 14. Proving Will, 370. pl. 16. One proves Will in the Name of both, not as to him who did not conſent, 370. pl. 17. Not if one Executor acts as Servant to the other, 371. pl. 18.

What Act makes Executor *de ſon tort*, 371. By acting under Commiſſary's Commiſſion *ad vendend'*, *&c.* 371. pl. 1. Wife's taking more Apparel than convenient, 371. pl. 2, 3. Not by adminiſtring Goods for Funeral, 371. pl. 4. By Seiſure of Goods, 371. pl. 5. Husband ſeiſing Goods after Divorce *cauſa præcontractus* an Appeal depending, 371. pl. 6. Uſing Goods where no Executor, 371. pl. 7, 8. 372. pl. 9, 11. Not by claiming Goods only, 372. pl. 10. If Stranger pays Debts, *&c.* tho' there is an Executor, 372. pl. 12. By what Acts Executor *de ſon tort* of a Term, 372. pl. 13, 14, 15.

Power of an Executor *de ſon tort*, 373. May pay Debts and recoup what paid, 373. pl. 1. Payment to Executor by former Will without Notice, not good againſt Executor by ſubſequent Will, 373. pl. 2. Selling and after taking out Adminiſtration, Sale good, 373. pl 3. Payments by Widow by Order of Son, who after took out Adminiſtration,

ſtration, good, 373. pl. 4. 374. pl. 5. Executor *de ſon tort* after taking out Adminiſtration, charged as Executor *de ſon tort*, 374. pl. 2, 3. So tho' taken out by Creditor, 374. pl. 5.

Who charged as Executors, 375. Executor *de ſon tort*, bound to pay Legacies, 375. pl. 1. Not Husband of Wife deceaſed who had waſted, 375. pl. 2, 3. Not Executor of Executor who had waſted by Common Law, but by Statute, 375. pl. 4, 5. Executor *durante*, who had waſted, charged not as Executor *de ſon tort*, but on the ſpecial Matter, 375. pl. 6. Creditor fraudulently taking Adminiſtration, 375. pl. 7.

What Aſſets, 376. Lands of which Executor infeoffed to ſell and diſtribute for his Soul, 376. pl. 1, 2, 3. Damages recovered as Executor, 376. pl. 4. Things in Chancery recovered, 376. pl. 5. Lands deviſed to Executors to ſell, not Aſſets till ſold, 376. pl. 6. But if deviſed to Executors and others to ſell, not Aſſets, 376. pl. 7. Lands deviſed to be ſold for Payment of Legacies, Aſſets only as to Legacies, 377. pl. 9, 10. Debt extinct, 377. pl. 12, 13. The Value of the Goods above the Debt for which by King ſeiſed, 377. pl. 14. Goods in Specie in the Hands of Adminiſtrator *durante*, *&c.* after Infant comes of Age, 377. pl. 15. Lands purchaſed by Villein of Executor, 377. pl. 16. Money brought in and by Order of Prerogative Court paid, where Writ by other Creditor taken out ſame Day, 377. pl. 17. Not Money due till recovered, unleſs put into Inventory as ſperate Debt, 378. pl. 18. Not Goods diſtrained or impounded, 378. pl. 19. Debt releaſed by Executor, 378. pl. 20. If Executor ſubmits to award or compounds the whole Aſſets, 378. pl. 21. Diverſity between Goods taken by Treſpaſſer in Life of Teſtator, and after his Death, 378. pl. 22, 23. Not where Debenture in Name of Truſtee, and Executor delivers it up and takes one in his own Name, 378. pl. 24. Executor receives Principal and Intereſt, and delivers up Bond, Aſſets only for what received, 378. pl. 25. Money paid to Stranger by Conſent of Executor, or if without, and he after brings Action for it, 379. pl. 26. If Executor of Termor receives the Profits, no more Aſſets than what above the Rent, 379. pl. 27. Bond in Truſt for another, no Aſſets, 379. pl. 28, 29. An Eſtate *pur auter vie*, Aſſets, by 29 *Car.* 2. 379. pl. 30.

In what Actions charged, 379. Not Executor of Gaoler for Eſcape of one in Execution, 379. pl. 1. But Debt lies againſt Executor of Sheriff for Money levied on *Fieri facias*, 379. pl. 2. By 30 *Car.* 2. Executors or Adminiſtrators of Executors *de ſon tort*, chargeable for Waſte and Converſion of Goods by Teſtator, *&c.* 380. pl. 3. And by 4 *&* 5 *Will. & Mar.* extended to Executors, or Adminiſtrators of Executors, or Adminiſtrators of Right, 380. pl. 4.

In Actions by or againſt Executors, how Plaintiff ought to demean himſelf, 380. Need not aver Defendant hath Aſſets, 380. pl. 1, 2, 3.

On *Scire facias* by Adminiſtrator upon a Judgment there needs no *profert in Curia* of the Letters of Adminiſtration, 381. pl. 4. Executor in his Declaration muſt ſhew forth the Teſtament, 381. pl. 5. In Action againſt Adminiſtrator ſufficient to ſhew Adminiſtration was *debita juris forma* granted to him, without ſhewing by whom, 381. pl. 6. By Adminiſtrator for Eſcape in his own Time, without ſhewing by whom Adminiſtration committed, 381. pl. 7. Adminiſtrator muſt make a *Profert*, *&c.* of his Letters of Adminiſtration, 381. pl. 8. Muſt ſhew by whom Adminiſtration was granted, 381. pl. 4. 382. pl. 10. Want of a *Profert* help'd after Verdict by 16 *&* 17 *Car.* 2. 382. pl. 11. By 4 *&* 5 *Ann.* helped, unleſs on ſpecial Demurrer for Want thereof, 382. pl. 12.

In Actions againſt Executors, how to demean themſelves, 382. In Pleading Judgments, 382. pl. 1, 2, 3. Where not Aſſets to ſatisfy, he ought to confeſs what Aſſets he hath, 383. pl. 4. Muſt plead, and cannot give Judgment in Evidence, 383. pl. 6, 7, 8. Adminiſtrator may plead Judgment againſt him as Executor, or Executor againſt him

as Adminiſtrator, 383. pl. 9. The Manner of pleading Judgment, 383. pl. 10, 11. In *Aſſumpſit* may plead Judgment againſt him in Debt on ſimple Contract, 384. pl. 12. Several Judgments pleaded *prout per ſeparalia recorda, &c.* 384. Where it need not be averred, it was for a true Debt, 384. pl. 14. In pleading Judgment for Principal and Intereſt in his Time, he ought to ſhew he had not Aſſets to pay the Intereſt, 384. pl. 15. Where in pleading Judgment, Time of Recovery and Entry muſt be ſhewed, 384. pl. 16. Where may in Bar ſhew Land extended, 384. pl. 17. Being charged as Executor may plead in Abatement, but not in Bar, that he is Adminiſtrator, 384. pl. 18. In *Scire facias* on 8 *&* 9 *Will.* againſt Adminiſtrator of Executor, Defendant to ſhew Cauſe why Damages ſhould not be aſſeſſed, *&c.* he cannot plead Judgment obtained againſt him on Teſtator's Bond, 384. pl. 19. Beſt to plead honeſtly, 385. pl. 20. Where one Judgment only is ill pleaded, or found fraudulent, 385. pl. 21. Pleading ſeveral Judgments, Confeſſion of Aſſets to pay all of them, 385. pl. 22.

Who may retain, 385. Lawful Executor, 385. pl. 1, 3. Adminiſtrator may, 385. pl. 2. 386. pl. 12. Not Executor *de ſon tort*, 385. pl. 4 Ordinary before Stat. of 31 *Ed.* 3. not ſince, 386. pl. 6. Husband of Executrix *durante, &c.* who had given Bonds for Money due from Teſtator, 386. pl. 7, 8. Executor that pays Debts of Teſtator, or to whom Teſtator indebted, 386. pl. 9, 10. For Money due to Executor on Contract, 386. pl. 11. Not for Money due on Bond againſt a Judgment againſt Teſtator, tho' entered after his Death, 386. pl. 13. Executor of Executor may for Debt by ſimple Contract againſt Debt grounded on *Devaſtavit* of firſt, 386. pl. 14. If Action brought againſt ſpecial Adminiſtrator, and his Adminiſtration determines pending, *&c.* he ought to retain to ſatisfy the Debt by the Action attached on him, 387. pl. 15. By Executor for Money paid for Redemption of Pawn, 387. pl. 1. So where their own Money paid for Debts of Teſtator, 387. pl. 2. For Coſts in recovering Teſtator's Debt, 387. pl. 3. If Obligee Executor retains Part, he cannot ſue Heir for Reſt, 387. pl. 4. Executor giving his own Bond for Debt of Teſtator, the Property of Goods to the Value altered, 387. pl. 5. Where Adminiſtrator with his own Money pays Debts of Inteſtate, he may retain Term to the Value, 387. pl. 6.

Power of Executor, 388. An Executrix cannot diſpoſe of Goods, Releaſe, *&c.* without her Husband, 388. pl. 1, 2. Wife cannot on a Judgment without a real Satisfaction, acknowledge Satisfaction, 388. pl. 3. Cannot waive a Leaſe when he hath Aſſets, 388. pl. 4, 5.

The Power between themſelves, 388. One may ſell the whole Term, and if one grants to the other, void, for he had the Whole before, 388. pl. 1. Tho' he had refuſed, 389. pl. 2. One Executor delivers Bond to Teſtator in Satisfaction of his own Debt, 389. pl. 4.

Executors; for what Debt chargeable, 389. For Arrears of an Account, 389. pl. 1, 2. Regularly not where Teſtator might have waged his Law, 389. pl. 3, 4. But lies upon an *Aſſumpſit*, 390. pl. 5. Several Caſes where Debt lies not, 390. pl. 5, 6, 7, *&c.* 12. For Arrears of Rent, 390. pl. 11. For Relief, 391. pl. 13. Not Debt on ſimple Contract, tho' Defendant admits it by Pleading thereto, 390. pl. 12, 391. pl. 14. Debt lies not againſt an Executor upon award in Life of Teſtator, 391. pl. 15. Debt lies not againſt Executor where no Debt in Teſtator, 391. pl. 16. Upon a Bill ſealed teſtifying Receipt, 391. pl. 17. Not by Aſſignee of Bankrupts of Debt by ſimple Contract, 391. pl. 18.

What Debts to be firſt ſatisfied, 392. Safe for Executors to file Bill againſt all Creditors, *&c.* 392. pl. 1. Margine. Bond before a Statute for Performance of Covenants, otherwiſe if for Payment of Money at Day to come, 392. pl. 1, 2. Bond before Recognizance for Payment of Money to Infant when of Age, 392. pl. 3. Not before Recognizance for Payment of Money to Stranger, 392. pl. 4. Not Bond of which the Day of Payment is not come

come, before one on which Day of Payment come, 393. pl. 5. Debt for which Action brought before one for which not, 393. pl. 6. Tho' Writ abates if another brought by Journeys Accounts, 393. pl. 7. 396. pl. 3. If two Actions brought, that of which he hath firſt Notice, 393. pl. 8. But having Notice of both, being of equal Nature, may confeſs Judgment on one, and pay that, 393. pl. 9, 10. Muſt take Notice of Debts on Record, and pay them firſt, 393. pl. 11. Bond before Debt by ſimple Contract, tho' Condition of Bond to pay at a Day to come, 393. pl. 12, 13. May pay Statutes and Bonds in which jointly bound with Teſtator, 393. pl. 14. Debt by ſimple Contract before Bond of which he had no Notice, 394. pl. 15. Debt for Rent and by Specialty equal, 394. pl. 16. Where ſeveral Judgments pleaded, and Plaintiff prays Judgment of Aſſets *in futuro*, and ſome after come, Defendant may ſatisfy Judgments pleaded, 394. pl. 17.

Judgments in Life of Teſtator, 394. Judgment before Statute, 394. pl. 1, 2. Unleſs Goods taken in Execution on Statute, without Conſent, Act or Folly of Executor, 394. pl. 1. Margine. Diverſity between Judgment upon Statute of 17 *Car.* 2. and 8 & 9 *Will.* entered after Death of Teſtator, 394. pl. 1. Margine. No Priority as to the Time of the Judgment, but he that ſues Execution firſt, *&c.* and if both bring a *Scire facias*, the Executor may confeſs the Action of which he will firſt, 395. pl. 3, 4.

What Debt firſt ſatisfied without *Devaſtavit*, 395. Sufficient for Funeral according to Degree may be imployed before Debts or Legacies paid, 395. pl. 1. 396. pl. 6. Not Rent grown due after Teſtator's Death, 395. pl. 3. Judgments in the Life of Teſtator before any Debt, 395. pl. 4. A Decree in Equity equal with a Judgment, 396. pl. 7.

Judgments in their own Time, 396. Muſt pay him who firſt recovers, 396. pl. 1. Where Action brought in another County, Executor before Notice may pay another, 396. pl. 1. The Wages of Servants within the Statute before Debts by ſimple Contract, Q. 397. pl. 1, 4. Debts on ſimple Contract before Legacies, 397. pl. 2, 3. Debts to King if not on Record, all one as if to common Perſon, 397. pl. 6. Legacies before Bonds for Performance of, *&c.* where doubtful whether they will ever be forfeited, 397. pl. 1, 2.

Judgment *de bonis teſtatoris ſi, &c. ſi non de bonis propriis*, 398. Upon Recovery of Debt and Damages, the Judgment for the Damages *de bonis teſtatoris, ſi, &c. ſi non, &c.* 398. pl. 1, 2. Where Recovery all in Damages, Judgment *de bonis teſtatoris tantum*, 398. pl. 3, 4. Againſt all the Executors for the Debt, and for the Coſts only againſt him that pleaded, 398. pl. 5.

Action; by what Name it lies againſt Executor, 398. Not againſt Executor, and Executor of the other Deceaſed, 398. pl. 1.

What Act or Pleas of one bind the other, 399. Where plead ſeverally, his Plea that is beſt for the Teſtator ſhall be received, 399. pl. 1. By one confeſſing the Action all bound, 399. pl. 2. Margine. Where by 9 *E.* 3. one that appears ſhall Anſwer, 399. pl. 2.

Judgment, when, and how given againſt Executors, 399. Tho' Aſſets found for Part only, yet Judgment given for Whole, 399. pl. 1. But if found he hath nothing, Judgment *Quod querens nil capiat, &c.* 400. pl. 2. Confeſſion of the Action admits Aſſets, 400. pl. 3. Where Aſſets found in the Hands of one Executor only, and yet Judgment muſt be given againſt all, 400. pl. 4. Otherwiſe where the Executors plead ſeverally by ſeveral Attornies, 400. pl. 5. Where Judgment againſt both of the Goods of the Deceaſed, and if not Damages of the Goods of him that pleaded, 400. pl. 6. Where Defendant pleads fully adminiſtred, Plaintiff may pray Judgment of Aſſets *in futuro*, 401. pl. 7.

Judgments general againſt Executors, 401. Where the Action upon his own Promiſe, 401. pl. 1. Where for Part incurred after Death of Teſtator, 402. pl. 10. 406. pl. 15. Where his Plea of *Ne unques Executor* found againſt him, 401. pl. 2, 3. 402. pl. 8. But if Aſſets found

found in the Hands of the other Executors, Judgment ſhall be againſt him only for the Reſidue of the Debt, 401. pl. 4. But otherwiſe where it does not appear the Executor hath Aſſets, 401. pl. 5. Where the Judgment for the Damages ſhall be general, 402. pl. 6, 7. Where *Devaſtavit* returned, and Judgment againſt Baron and Feme *de bonis propriis*, 402. pl. 9, 11. Not on falſe Plea that does not eſtrange them from Executorſhip, 406. pl. 17.

Judgments *de bonis teſtatoris* only, 403. Where upon *Nil dicit*, 403. pl. 1. Where Plea in Abatement found againſt him, 403. pl. 3. Where fully adminiſtred found againſt him, 403. pl. 3. Tho' he pleads a falſe Acquittance, and it is found againſt him, for by that he did not eſtrange himſelf from the Will, 403. pl. 4. So if he denies the Bond of his Teſtator, and it is found againſt him, 403. pl. 5. Tho' Judgment by him pleaded found to be by Covin, 403. pl. 6. In Covenant where for Breach in Time of Teſtator, 403. pl. 7. So tho' for Breach in Time of Executors, becauſe all to be recovered in Damages, 403. pl. 8. 404. pl. 9.

Execution of it, 404. Not of Goods ſold by Executors before Execution iſſued, nor of the Money or Goods for them given, 404. pl. 1. How to proceed with or without an Inquiſition, 404. pl. 2, 3.

Judgment *de bonis teſtatoris, ſi, &c. ſi non, &c. de bonis propriis*, 405. Several Caſes, 405. pl. 1, 2, *&c.* and how to proceed on Sheriff's Return, 405. pl. 4, 5, 6, *&c.* Where one pleads *Ne unque Executor*, and the other fully adminiſtred, and both Pleas found againſt them, the Judgment ſhall be againſt both *de bonis teſtatoris & ſi non de bonis propriis* of him that pleaded *Ne unque, &c.* 405. pl. 10. As to Damages and Coſts *de bonis teſtatoris, ſi, &c.* and if not *de bonis propriis*, tho' Executor appeared the firſt Day, and *Nil dicit*, 405. pl. 11. So if he acknowledges the Action, 405. pl. 12. 406. pl. 13, 14. Upon Plea of *Ne unque* Executor to a *Scire facias* on a Judgment, tho' found againſt him, Judgment only *de bonis teſtatoris*, 406. pl. 16.

Diſtribution by 21 *H.* 8. 408. By 22 *&* 23 *Car.* 2. with many Notes thereon, 408, 409. By 29 *Car.* 2. extends not to the Eſtates of Feme Coverts, 410. pl. 9. By 1 *Jac.* 2. the Mother to have but an equal Share with Brothers and Siſters, 410. pl. 11.

Adminiſtration; Repeal thereof, 410. The Effect of ſuch Repeal, 410.

Refuſal of Executorſhip, 411. By Letter ſent chief Officer of Prerogative Court, 411. pl. 1. May accept Executorſhip of laſt, and refuſe as to firſt, 411. pl. 2. The ſurviving Executor continues Executor tho' he never acted till actual Renunciation, 411. pl. 3. 412. pl. 4. If one proves the Will, the Right is in both, 412. pl. 5.

Executors; where joint or to be joined in Action, 412. Action by them muſt be in the Name as well of thoſe who refuſed, as thoſe who proved the Will, 412. pl. 1. But Actions may be brought only againſt them who proved the Will or adminiſtred, 412. pl. 2. Thoſe under Age muſt join in Action with thoſe of full Age, 412. pl. 3.

Pleadings, Replication, Rejoinder, 413. May reply to each Judgment pleaded, that it was by Fraud, 413. pl. 1. Or if to all, Defendant muſt rejoin, that they or any of them are not, *&c.* 413. pl. 2. Where Plaintiff replies, that Defendant compounded Judgment for leſs, *&c.* 413. pl. 3. If Plaintiff replies, that the Judgment was obtained after Death of Teſtator, the Defendant muſt anſwer as to the Death, 413. pl. 4. Replication, that Defendant had Aſſets ſufficient to ſatisfy all the Judgments, and Plaintiff's Debt alſo, 413. pl. 5. Where Executor may defend in Reſpect of the Penalties in the Bonds forfeited, 414. pl. 6.

Where Traverſe neceſſary, 414. If in Action by Adminiſtrator, Defendant pleads he was made Executor, he muſt traverſe the dying Inteſtate, 414. pl. 1. But in Debt againſt one as Executrix of her Husband, ſhe may plead he died Inteſtate, and Adminiſtration granted to her, without traverſing ſhe is Executrix, 414. pl. 2.

pl. 2. Otherwiſe if one ſued as Adminiſtrator, &c. 414 pl. 3.

Extent. Vide **Execution.**

Extinguiſhment.

By Conjunction of Eſtates, 415. Not where ſecond Conuſee extends on firſt, and grants to Reverſioner, 415 pl. 1. Not where Copyholder hath a Way, and purchaſes Inheritance of his Copyhold, 415. pl. 2. Tenant for Life, and a Stranger purchaſe Reverſion, extinct for a Moiety, 415. pl. 3. So if one Jointenant for Life purchaſes Reverſion, 415. pl. 4. So if Fee deſcends to one Leſſee, 415. pl. 5. So if Rent granted to Tenant of the Land and Stranger, 415. pl. 6. So if Leſſee for Life grants to Leſſor and Stranger, 415. pl. 7. Not if Tenant infeoff Lord and Stranger, 415. pl. 8. Not if Leſſee for Years as Executor, purchaſes Reverſion, 415. pl. 9. Where no Extinguiſhment when the Eſtates are in ſeveral Rights, 416. pl. 10, 11, &c. to 15. Where Tenancy and Meſnalty come together, 416. pl. 16. Not where both Eſtates limited by one Conveyance, 416. pl. 17. By Mortgage in Fee to Leſſee for Years, tho' Money paid at the Day, 416. pl. 18. Deviſe to Wife, and if ſhe marries or dies, to his Son, and Reverſioner enfeoffs her, 416. pl. 16. Leſſee for Years grants Rent to Leſſor, who after grants his Reverſion to Leſſee, the Rent is extinct, 416. pl. 20.

By Act in Law, 417. Making one Executor who had fully adminiſtred, or Executor that refuſes, does not extinguiſh Debt, 417. pl. 1. Not by Ordinary's granting Adminiſtration to Obligor, 417. pl. 2. But if Obligee makes Obligor Executor, the Debt is extinguiſhed, 417. pl. 3. 418. pl. 8. If Feme Obligee marries Obligor, or one of them, 417. pl. 4. Not if Executrix of Obligee marries Obligor, 417. pl. 5. When Obligor makes Executrix of Obligee his Executrix, leaving Aſſets, the Debt is ſatisfied by Retainer, 417. pl. 6. Promiſe to leave a Woman 100 *l.* not extinguiſhed by Marriage, 418. pl. 7. Obligee makes Obligor Executor who adminiſters, but dies before Probate, it is a Releaſe, 418. pl. 9.

By Unity of Poſſeſſion by Act of Parties, 418. Lord enfeoffs Tenant and two others, 418. pl. 1, 2. If he that hath common appendant purchaſes the Land in which, 419. pl. 3. So of Common in groſs, 419. pl. 5. Otherwiſe of Shack Common, 419. pl 6. Not Right of Purlieu, 419. pl 7. Of a Way, 419. pl. 8, 9. Not of Way by Vill to a Church, by one of the Vill purchaſing the Land over which, 419. pl. 10. Not of a Gutter running thro' another Houſe, by Cuſtom of *London*, 419. pl. 11. Not a Right of Incloſure by Preſcription, 419. pl. 12. Not of a Water-courſe, 420. pl. 13. Not by King's purchaſing Part of a Manor to which Leet belongs, 420. pl 14. Not Tithes, 420. pl. 15. Not by King's Purchaſe of Manor as to Copyholders in the Waſte, 420. pl. 16, Not of a Way abſolutely neceſſary, 420. pl. 17. Not of a neceſſary Eaſement, 420. pl. 18. Not King's Penſion by him reſerved or granted out of Land, 420. pl. 19.

Cuſtoms, 420. Not Cuſtom annexed to Seigniory, 421. pl. 1. Cuſtom that every Tenant upon Alienation ſhall pay a Fine extinguiſhed, 421. pl. 2, 3. Otherwiſe if Cuſtom general thro' County, 421. pl. 4. Cuſtom annexed to Tenancy, 421. pl. 5. Cuſtom of Gavelkind or Borough Engliſh, not by Unity, 421. pl. 6. Lights, 421. pl. 7, 8, 9, 10.

Acts in Law, 422. Lands deſcend to two Parceners, out of which one had a Rent or Seigniory, 422. pl. 1. 2. Meſne marries Tenant, 422. pl. 3. Otherwiſe if both deſcend to their Iſſue, 422. pl. 4. By Eſcheat of Remainder, Seigniory extinct as to Tenant for Life, 422. pl. 5. Otherwiſe in Caſe of a Rent-charge, 422. pl 6.

Extinguiſhment by Feoffment or other Act, 422. By Lords infeoffing Tenant, 422. pl. 1. By Feoffment of Manor in which one hath Common, 423. pl 2, 3. Not contingent Eſtate after veſted, 423. pl. 4. Tenant infeoffs Lord and other, and they enfeoff Tenant or other, 423. pl. 5. By Lord's Feoffment of Part, or his Releaſe in Part, 423. pl. 6, 7. By Lord's diſſeiſing Tenant, and making Feoffment on Condition,

423. pl. 8. By Diſſeiſee levying Fine to Stranger, 423. pl. 9.

Suſpenſion, 423. Of Rent by Leſſor's Entry on Part, 423. pl. 1. Not if by Conſent of Sub-leſſee at Will, 423. pl. 2. 424. pl. 3. Of Common by Incloſure of Part of the Waſte in which, 424. pl. 4. Is always where Leſſor enters wrongfully, 424. pl. 5.

What Act makes Suſpenſion, 424. Rent-Service not ſuſpended in Part and in *Eſſe* for other Part, 424. pl. 1. Land out of which, *&c.* deſcends to Grantee of a Rent and another as Parceners, Rent ſuſpended as to Diſtreſs till Partition, 424. pl. 2. Tenant in Tail grants a Rent to Remainder-man in Tail, no Suſpenſion, 424. pl. 3. So if Remainder in Tail purchaſes Rent granted before theſe Eſtates created, 424. pl. 4. Leaſe of one Acre to Lord ſuſpends Seigniory in the Whole, 425. pl. 5, 6. Leſſor acknowledges Statute and after grants Reverſion to Conuſee, this ſuſpends Statute, 425. pl. 7. After Leaſe by Parſon, he takes Lambs, *&c.* it does not ſuſpend his Rent, 425. pl. 9. Rent not by Leſſee's making Leaſe to Leſſor to begin two Years after, 425. pl. 9. If Feoffment on collateral Condition and Feoffee redemiſes to Feoffor, Condition is not ſuſpended, 425. pl. 10.

Suſpenſion by Act in Law, 425. Where Seigniory in Part only, as if Guardian in Chivalry had entered on Land of Ward within Age, and Wife of Tenant had been after endowed, 425. pl 1. So if Part of Tenancy deſcends to Lord, 425. pl. 2. So in Caſe of Rent Charge, 425. pl. 3.

Suſpenſion by Act of God, Enemies, *&c.* 426. Not by Enemy's entring and holding out Leſſee, 426. pl. 1.

Suſpenſion of Perſonal Things, 426. Grant not to ſue before ſuch a Day, no Suſpenſion, 426. pl. 1. Otherwiſe if ſaid, and if he ſues, that he may plead this Grant as a Releaſe, 426. pl. 2. Covenant not to diſtrain in Part of the Land out of which Rent iſſues, not ſo, 426. pl. 3. Releaſe to one Obligor, provided the other ſhall take no Advantage of it, *Proviſo* void, 426. pl. 4. Diverſity between Covenant not to ſue, and not to ſue for ninety-nine Years, 427. pl. 5, 6, 7. Letter of License with Clauſe, that if Creditor ſues it ſhall be a Releaſe, 427. pl. 8.

Perſonal Thing once ſuſpended, extinct, 427. Not if by Act in Law, 427. pl. 1. As if Executrix of Debtee marries Debtor, and Huſband dies, 427. pl. 2. If Obligee makes Wife of one of the Obligors Executrix, and her Husband makes her Executrix alſo, 427. pl. 3. If Obligee make Wife of one of the Obligors Executrix, who adminiſters, 427. pl. 4. By Debtee's taking Adminiſtration to Debtor, if he hath Aſſets, elſe not, 428. pl 5.

Suſpenſion avoided, 428. By Reentry, 428. pl. 1, 2. Cutting down Trees by Leſſor, or plowing Warren, no Suſpenſion, 428. pl. 3, 4. So plowing Common none, 428. pl. 5. Avoided by Surrender of Leaſe by which made, 429. pl. 6. Pulling down Penthouſe by Leſſor no Suſpenſion, 429. pl. 7. Not by Keeping what never out of Leſſor's Poſſeſſion, 429. pl. 8.

Forfeiture.

Of what Eſtates, 217. Tenant for Life, Remainder in Tail, Remainder to Heirs of Tenant for Life, and he makes Feoffment, it is a Forfeiture of the Eſtate for Life, 217. pl. 1. By Tenant after Poſſibility, *&c.* 217. pl. 2. Of Right to particular Eſtate, 217. pl. 3. 223. pl. 17. As if Tenant for Life being diſſeiſed, levies Fine, 217. pl. 4. 218. pl. 5. By Tenant by Curteſy in Dower *pur auter vie*, *&c.* 218. pl. 6.

By what Perſon, 218. By Husband of Wife's Eſtate, 218. pl. 1, 2, 3. Diverſity where for Life or Years, 218. pl. 4, 5. Acceptance of Fine by Husband and Wife, binds not Wife after Death of Husband, 218. pl. 6. Diverſity as to Infant or Feme Covert where Condition in Law, and where expreſs Condition, 218. pl. 7. Feoffment by Husband after Iſſue had, no Forfeiture, 218. pl. 8.

By Matter of Record, 219. By Attornment of Tenant for Life in a *Quid juris clamat* on Fine by one who

who had nothing in the Reverſion, 219. pl. 1. So if by Fine of Husband alone, when the Husband and Wife had the Reverſion jointly, 219. pl. 2. By Fine of Advowſon, Rent, *&c.* lying in Grant, 219. pl. 3. By acknowledging Reverſion in a Stranger, as by Acceptance of a Fine *Sur Cognizance de droit, &c.* from him, 220. pl. 1, 2. Otherwiſe of Fine *Sur Cognizance de droit tantum* with a Releaſe, 220. pl. 3. By claiming Fee in *Quid juris clamat*, tho' he had Colour ſo to do, 220. pl. 5, 6. Where not by Attornment in a *Quid juris clamat*, 220. pl. 7, 8, *&c.* By pleading *Nul waſte* in Action brought by Stranger, 221. pl. 11. By Recovery ſuffered, or confeſſing Action in a Writ of Entry brought by Stranger, 221. pl. 12, 13. By Recovery by Tenants for Lives covenous Pleading *nient dedire, &c.* 221. pl. 14, 15, *&c.* By Leſſee for Years ouſted, bringing Aſſiſe *ut de libero tenemento*, 221. pl. 20. Joining Miſe in a Writ of Right upon the meer Right, 220. pl. 20. By Fine levied to Bargainee for Life, 220. pl. 21. By Tenant for Life in Remainder levying a Fine, 221. pl. 23. By Leſſee for Years, claiming Fee by Bargain and Sale in Debt brought againſt him for Rent, 221. pl. 24. Not by claiming Fee in an Inducement to traverſe, that he was Tenant for Life, and found that he was Tenant by Curteſy, 222. pl. 25. By Tenant for Life in Remainder levying Fine, 222. pl. 26. If to Tenant for Life in Remainder, Forfeiture of both their Eſtates, 222. pl. 27.

What Thing Forfeiture, 222. Alienation in Fee or for Life, 222. pl. 1, 2. Not of Things that lie in Grant, unleſs by Fine, 222. pl. 3, 4, 5. Alienation of Manor, or Acre thereof, to which Advowſon appendant, Forfeiture, 223. pl. 6, 7. Not if one diſſeiſes his Tenant for Life, and leaſes for Life to another, who leaſes to firſt Leſſee, 223. pl. 8. Feoffment by King, Tenant for Life, 223. pl. 10. Not if Tenant for Life and Remainder in Tail join in Fine, 223. pl. 11. Feoffment by Husband of Tenant for Life to the Uſe of the Wife for her Life, no Forfeiture, 223. pl. 1. Leſſee for Life levies a Fine to *B.* for the Life of the Leſſee, to the Uſe of *B.* for his Life, no Forfeiture, 224. pl. 2. Forfeiture, or not, in regard of others joining, 224. pl 4, 5, 6, *&c.* By Remainder for Life, tho' he had the Fee in him after a Remainder in Tail, 224. pl. 9.

Where Feoffment to Reverſioner, or not, 225. pl. 1, 2, *&c.* Not where he is Party, 225. pl. 5, 6. Otherwiſe if not immediate Remainder-man, 225. pl. 7.

Diſpenſation with Forfeiture by Remainder-man, 226. L, M. Not excuſed by joining with one whoſe Remainder was barred by collateral Warranty, tho' no Notice thereof, 226. N. 1. Not purged by Entry for Condition broke, 227. pl. 1, 2. Nor if Tenant for Life leaſes to *B.* for Life, and *B.* dies, 227. pl. 4.

On whom an Entry made for it, 227. On the Alienee or any Party to Forfeiture, 227. pl. 1, 2. On his Heir, 228. pl. 4. One intitled by Forfeiture of Advowſon cannot preſent to Avoidance falling before Claim made for the Forfeiture, 228. pl. 2. After the Leaſe that made the Forfeiture determined, 228. pl. 3. After Execution ſued on a Recovery, 228. pl. 4. After Recovery that made the Forfeiture reverſed, 228. pl. 5.

Who take Advantage thereof, *&c.* 229. He in Remainder, 229. pl. 5, 6. Second Remainder-man in Tail where firſt enfeoffed, 229. pl. 1. So if ſecond enfeoffed, firſt may enter, 229. pl. 2. Son of Remainder in Tail that had releaſed, 229. pl. 4. Tenant for Life in Remainder, and if he doth not, Remainder in Fee may enter to his Uſe, 229. pl. 9. 230. pl. 17. He in whoſe Time the Forfeiture was not, as Iſſue of Tenant in Tail; ſecond in Remainder where firſt entered not, 229. pl. 10, 11. He that hath the Fee upon Alienation of his Jointenant for Life, 229. pl. 12. Upon Lord's Leaſe of Copyhold to begin after Forfeiture, *&c.* of the Copyhold Tenant for Life, and he forfeits, if Lord will not, Leſſee may enter, 229. pl. 13. Not one who had no Eſtate in Remainder at the Time of the Forfeiture, 230. pl. 14. He that had only a Right to a Remainder, 230. pl. 16.

An INDEX.

Freehold. Vide **Eſtate.**

Freſh Purſuit. Vide **Eſcape.**

Infant, Feme Covert, &c. Vide **Eſchange.**

Diverſity where Infant makes Feoffment in Perſon, and where by Letter of Attorney, in laſt Caſe, void, 136. pl. 5, 6.

Limitation of Eſtates. Vide **Eſtates.**

Leaſes.

For Years of Copyhold, 204. S. 1, 2, *&c.* Of incorporeal Things good by Way of Contract, 204. S. 1. Marg. Of Copyhold for more than an Year, not void, 205. pl. 4. Even if made by King's Copyholder, 205. pl. 4. By one that hath entered upon a Limitation to hold till ſatisfied Arrears of Rent, 205. pl. 6. Not of an Office, 205. pl. 7, 8, *&c.* Otherwiſe if determinable by Death of Grantee, 206. pl. 9. Diverſity between judicial and miniſterial Office, 206. pl. 9. Marg. Deviſe to one and the Heirs of his Body for 5000 Years, is a Leaſe, and not a Tail, and ſhall determine for Want of Iſſue, 206. pl. 2.

By what Words; not by Covenant to levy a Fine to the Uſe of one for thirteen Years, if none actually levied, 206. pl. 1. By Covenant or Licence to enjoy for Time certain, 207. pl. 1. Where the Words import a preſent Demiſe, tho' Time after given for making the Leaſe, 207. pl. 2. Where Covenant to permit and ſuffer one to hold, 207. pl. 3. Where ſhort Inſtructions to draw one amounted not to Leaſe, 207. pl 4. By what Words parol Leaſe good, tho' no Writing after made, 208. pl. 5. Agreement to ſow at Halfs, 208. pl. 6. Not where by Articles expreſly demiſed, if *Memorandum* indorſed, that a Leaſe was to be ſettled by Counſel, 208. pl. 7. As Covenant that one ſhall hold for ſix Years makes Leaſe, ſo Covenant to pay yearly Rent makes Reſervation, 208. pl. 8. Covenant and Grant by Copyholder, that one ſhall hold from ſeven Years to ſeven Years Leaſe, tho' Forfeiture, 208. pl. 9. If *A.* Grants and agrees with *B.* his Heir, *&c.* that it ſhould be lawful to uſe a Way over, *&c.* it is a good Grant, and not a Covenant for Enjoyment only, 209. pl. 10.

Good, or not, in Reſpect of Uncertainty, as where Termor grants all his Term after his Death, 209. pl. 1, 2. 210. pl. 15, 16. Leaſe for ſo many Years as one ſhall live, void, 209. pl. 3. Termor grants ſo many Years as ſhall be to come at his Death, void, 209. pl. 4. But Deviſe by Leſſee for ſo many Years as ſhall be to come at his Death, good, 209. pl. 5. Leſſee for ninety Years leaſes for ſeventy Years, to begin after his Death, good, 209. pl. 6. Leaſe for Life, provided that if the Leſſee dies before forty Years, his Executors ſhall have for ſo many of the Years as ſhall make forty, 209. pl. 7. The Years muſt be certain when the Leaſe takes Effect in Intereſt or Poſſeſſion, but before may depend on Contingency, 210. pl. 9. As Leaſe for twenty-one Years, when *A.* pays 20 *l.* 210. pl. 10. Leaſe for ſo many Years as *J. S.* names, 210. pl. 11. Good if to be made certain by Reference, as if for ſo many Years as *B.* hath in the Manor of *C.* 210. pl. 12, 13. For ſo many Years as Executor of Leſſee ſhall name, not good, becauſe not reduced to Certainty in Life of the Parties, 210. pl. 14. Termor grants *habend.* after his Death, and good, and *habend.* void, 210, 211.

When to begin, 211. If no Time mentioned, from Delivery, 211. pl. 1. Diverſity where to begin *a fine termini* twenty-one Years, and where *a fine* twenty-one Years, 211. pl. 2, 4. If to begin from an impoſſible Date, it muſt from Delivery, 211. pl. 5. So if from End of a former Leaſe, and there is none, or miſrecited, tho' void in Caſe of the King, 211. pl. 6. 212. pl. 8. If to begin from *Lady-day* next before the Date of an Indenture, and none mentioned it ſhall begin from *Lady-day* before the Date of Leaſe, 212. pl. 7, 10. May begin in Computation from one Time and Intereſt from another, 212. pl. 9, 11. 213. pl. 12. If to begin

begin from the End of ſeveral Leaſes of ſeveral Parcels, it ſhall be taken reſpectively, 213. pl. 13. To begin after Leaſe to the Husband, where it was made to the Wife, ſhall be taken ſo to give ſecond Leaſe a good Commencement, 213. pl. 14. To be taken moſt ſtrongly againſt Leſſor, 213. pl. 15. If to begin from Surrender, Forfeiture or End of former Leaſe, it muſt from the firſt which happens, 214. pl. 16. Leaſe for forty Years after a Copyhold for three Lives determines, and the Wife of one hath her Free Bench, it ſhall not begin till after her Death, 214. pl. 17. Where Leaſe miſ-recited, 214. pl. 18, 19. Several other Caſes where Miſtakes in Recitals, *&c.* 215. pl. 20, 21, *&c.*

Leaſe; for how many Years ſaid to be, 216. For three Years, and from the End thereof for three Years, and ſo from three Years to three, is for twelve Years, 216. pl. 1. Several like Caſes, *&c.* ſo long as both Parties pleaſe, is but at Will, 216. pl. 7. Leaſe for Years is good for two Years, 216. pl. 8. From twenty-one to twenty-one for ninety-nine Years, 216. pl. 9. *De anno in annum quamdiu ambabus partibus placeret*, good for two Years, and if he begins another, for the Third, 216. pl. 10.

Leaſe by one Jointenant to the other, 217. pl. 1. 233. pl. 1.

Leaſe at Will muſt be at the Will of both, 230. pl. 2, 3. Agreement with *B.* to permit him to put a Stack of Hay on his Land as long as he pleaſes, is no Leaſe of the Land, 230. pl. 4. Payment of Rent by Tenant at Sufferance, or Diſſeiſin, makes him Tenant at Will, 231. pl. 5. Feoffee, Leſſee, *&c.* Tenant at Will till Livery made, 231. pl. 6, 7. But Deed of Feoffment to *A.* and his Heirs to uſe of *B.* and his Heirs, does not make *A.* Tenant at Will till Livery, 231. pl. 8. Nor *B.* 231. pl. 9. Not where Covenant to ſuffer one to enjoy Land *a die datus* for Life, 231. pl. 10. *Ceſtuy que uſe* that takes the Profits, 231. pl. 11. 232. pl. 6. Not where Mortgagee covenants he will not take the Profits, 232. pl. 12. Diverſity where Termor grants *totum Meſſuagium ſuum*, and where all his Intereſt, 232. pl. 13. Leaſe for one Year, and after for nine or twelve, as ſhall be agreed, *&c.* 232. pl. 14.

By Act of Law; as if Grandfather holds Land for Nouriſhment, 232. pl. 1. Not King's Grantee, if Grant void, 232. pl. 2, 3. Otherwiſe where Rent reſerved, 232. pl. 4. Rent granted for Life for executing an Office granted at Will by K. determines with the Office, 232. pl. 5. Leaſe at Will, not by one Jointenant to the other, 233. pl. 1. 217. pl. 1.

Determination of Will, 233. Not by Leſſor's granting Rent-charge, 233. pl. 1. Not by covenanting to enfeoff Leſſee, 232. pl. 2. By Leſſor's Entry, cutting down Trees, putting his Cattle into Common, 233. pl. 3, 4, 5. 236. pl. 2. But not by Words ſpoke off the Land, till Leſſee hath Notice, 235. pl. 3. By Leſſee's cutting down Timber-Trees, 234. pl. 6. By his granting over his Eſtate, tho' void, 234. pl. 7. By Leſſor's impounding Diſtreſs on Premiſſes, 234. pl. 8. By Leſſor's making a Leaſe for Years to begin preſently, tho' Agreement that he ſhall not enter till after the Day on which Rent becomes due from Leſſee at Will, 234. pl. 9. By Outlawry of Leſſor, 234. pl. 1. Of Leſſee, 234. pl. 2. Not by Marriage of a Woman, Leſſor at Will, 234. pl. 3. So of Leſſee at Will, 234. pl. 4. Not by Death of the Husband Leſſor, 234. pl. 5. Nor by Death of one Tenant, Leſſor or Leſſee, 234. pl. 6. By Death of Leſſee, tho' to hold to him and his Heirs, 235. pl. 7. Not by Entry of Stranger, 235. A. 1. Leſſee cannot determine before the Rent-day, ſo as to avoid Payment of the Rent, 235. pl. 1, 2.

How determined, 236. Not ſecretly, without Notice given Leſſor, 236. pl. 1, 2.

Tenant at Sufferance, 236. Not King's Tenant that holds over, otherwiſe of Tenant of Subject, 236. pl. 1. Or if Leſſee at Will holds over after Death of Leſſor, 236. pl. 2. Not Guardian that continues in after Age of Heir, but Abator, 236. pl. 3.

Leaſes by Eccleſiaſtical Perſons by Common Law, 243. pl. 1.

By Biſhops, *&c.* 32 *H.* 8. 243, 244, 245. Biſhops reſtrained by 1 *El.* 246,

246, 247. Colleges, Deans and Chapters reſtrained by 13 *El.* 248, 249. Leaſes void by Non-reſidence, by 13 *El.* c. 20. 249. Bonds, Covenants, *&c.* for Enjoyment, *con.* 13 *El.* void by 14 *El.* 249. Upon Leaſes by Colleges one third Part of the Rent to be reſerved in Corn, 250. Concurrent Leaſes by Colleges, *&c.* reſtrained by 18 *El.* 251. Judgment for Enjoyment contrary to 13 *El.* void by 43 *El.* 251

Ordinary. Vide **Executors.**

Priſon. Priſoners.

How to be kept, 115. pl. 1, 2. Whether in Irons, 115. pl. 2. Margine. How removed from one Priſon to another, 115. pl. 3. 116. pl. 4. Not to be ſuffered to go at large by Reaſon of Plague, 117. pl. 9. 118. pl 10. May be out of Cuſtody on *Habeas Corpus* for a ſmall Time, if Writ obeyed by having him at the Day, 118. pl. 11. Where it may be kept, 123. Place may be appointed by King's Bench for keeping *Marſhalſea*, and Extent of it limited by Rule of Court, and this the proper Method in Caſe of Plague, *&c.* 123. pl. 2. There are two ſeveral Sides in *Newgate*, one for *Middleſex* another for *London*, 321. pl. 2.

Peers; where liable to be taken in Execution. *Vide* **Execution.**

Pleadings. *Vide* at the End of the ſeveral Titles.

Releaſe. Vide **Extinguiſhment.**

Re-extent. Vide **Execution.**

Reſcue. Vide **Eſcape.**

Scire facias.

Where Execution not to be without it, 329. Not on Judgment affirmed upon Error, tho' within the Year, 329. pl. 1. Where affirmed after the Year, Execution within the Year after Affirmance without *Scire facias*, 329. pl. 2. 330. pl. 3. After the Year where Execution ſtayed by Act of Defendant, 330. pl. 4, 5. But not after Year, where Principal and Bail join in Error, becauſe void, 330. pl. 6. *Scire facias* in real, but not in perſonal Actions at Common Law, 330. pl. 7, 8, 9. In mix'd, 331. pl. 12. After Year and Day, Plaintiff may enter an *Elegit* on the Roll, and continue it, 331. pl. 10. No *Habere facias Seiſinam* in an Ejectment after the Year and Day without *Scire facias*, 331. pl. 11. After *Ceſſet executio* for a Year, 331. pl. 12. Not without upon a Recognizance for Payment of Money at a Day above an Year after the Date, 331. pl. 1, 2. Upon a Judgment in an Annuity within the Year after every Day of Payment, 331. pl. 3. One bound to his Good Behaviour not indictable for Breach before *Scire facias*, 332. pl. 4. Upon a Recognizance after every Day of Payment without *Scire facias*, 332. pl. 5. If Execution taken out within the Year continued and executed after, 332. pl. 6. Not againſt Executors without, 332. pl. 1. Nor by Executors without, 332. pl. 2. If not Party, tho' privy to Record, cannot have Execution without, 332. pl. 3. After Judgment Informer died, and his Adminiſtrator ſuggeſting it on the Roll, had his Moiety, 332. pl. 4. After Judgment in *Quare Impedit*, the Plaintiff being outlawed, King had a *Scire facias*, 332. pl. 5. If one Plaintiff dies, the other ſuggeſting it on the Roll, may have Execution without. So if one Defendant dies, 332. pl. 6. By Aſſignee of a Bankrupt, 333. pl. 6. Not after *Scire facias* ſued within the Year till Judgment therein, 333. How, and againſt what Perſon, 333. Againſt Heir in general or *B.* Son and Heir, 333. pl. 1. If Heir returned dead, it lies againſt Tertenants, 333. pl. 2. But not before ſome Return as to him, 333. pl. 3. Where on *Scire facias* one is returned Tertenant, he may ſhew there are others, 333. pl. 4. If one Defendant dies, *Scire facias* againſt Survivor only, 334. pl. 5, 6.

Suſpenſion. Vide **Extinguiſhment.**

Tenant after Poſſibility for Life, Years, *&c.* *Vide* **Eſtate.**

FINIS.

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